SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 639

GWENDOLYN HOYT, APPELLANT,

vs.

FLORIDA

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

INDEX

[fol. 1] [File endorsement omitted]

IN THE CRIMINAL COURT OF RECORD OF THE COUNTY OF HILLSBOROUGH AND STATE OF FLORIDA

The 3rd day of October, August Term, 1957.

Case No. 46464

THE STATE OF FLORIDA,

vs.

GWENDOLYN HOYT

INFORMATION FOR MURDER, 2ND DEGREE—Filed October 3, 1957

In the name and by the authority of the State of Florida:

Paul B. Johnson, County Solicitor for the County of Hillsborough, Charges that Gwendolyn Hoyt of the County of Hillsborough and State of Florida, on the 20th day of September, 1957, in the County and State aforesaid, by an act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, did unlawfully and feloniously make an assault on one Clarence Hoyt with a deadly weapon, to-wit: a baseball bat, a further description of which is to the Solicitor unknown, and in furtherance of said assault the said Gwendolyn Hoyt did strike, beat, bruise and wound the said Clarence Hoyt, thus and thereby inflicting on and upon the head, body and limbs of him, the said Clarence Hoyt, mortal wounds and hurts, of which said mortal [fol. 2] wounds and hurts the said Clarence Hoyt did then and there languish and on the 20th day of September, 1957 did die; and so the said Gwendolyn Hoyt did feloniously kill and murder the said Clarence Hoyt in the manner and form aforesaid, contrary to the form of the Statute in

such cases made and provided, and against the peace and dignity of the State of Florida.

s/ Paul B. Johnson, County Solicitor, Hillsborough County, Florida.

Duly sworn to by Paul B. Johnson. Jurat omitted in printing.

WITNESSES FOR STATE

Ford, Rivero, Littleton, P. D., Tampa, Fla.
Lt. William Armistead, Homestead Air Force Base.
Dr. Mauricio Rubio, Mason Smith Clinic.
Dr. Mason Trupp, 329 East Davis Blvd., Tampa, Fla.
Dr. Garth B. Dettinger, MeDill Air Force Base Hospital.
[fol. 3] Mr. & Mrs. C. W. Denton, 4101 Bay Court, Tampa, Fla.
Gore, Nemeth & Mills, P.D. Tampa.
Dr. F. Karan, MacDill Field Base Hospital, MacDill FAB, Tampa, Fla.
John Davis & Mr. Howarth, B. Marion Reed Home.
Mrs. R. E. Olds—3003 Vanburen, Tampa, Fla.
Dr. Alfred E. Iwantsch, 45 Bridges Loop, Tampa, Fla.
Mrs. Maria Lopez, 3004 Meadows, Tampa, Fla.

[fol. 4] IN THE CRIMINAL COURT OF RECORD OF THE COUNTY OF HILLSBOROUGH AND STATE OF FLORIDA

MINUTE ENTRY OF—November 15, 1957

LIST OF JURORS DRAWN BY THE COURT

And the Court drew from the jury box the following names:

Lester B. Harris, Rt. 2, Box 1030, Tpa.
Geo. W. Surrency, Rt. 3, Plant City.
Mark Lee C. Crosby, 1021 E. Commanche.
Marvin Giddings, 1212 S. Albany.
Thomas Edison Bryant, Wimauma, Fla.
Daniel M. Lamoreaux, 6614 Central.

Emmitte A. Moore, Jr., 127 W. Fern.
Walter W. Smith, Rt. 1, Box 135, Dover.
Robert A. Brown, 807 W. Idlewild.
Robt. U. Ellis, 3913 Obispo.
Wm. T. Thomas, P.O. Box 243, Lutz.
Paul Prinzi, 3210 Horatio.
Adrian D. Kent, 6801 Branch.
Paul W. Palmer, Rt. 2, Box 581, Lutz.
John H. Saunders, Jr., 558 Severn.
Jos. Baker, Rt. 5, Box 410B, Tpa.
Vincent D. Taylor, 3811 Paxton.
Stanley L. Mautte, 2909 Bay View.
Arthur E. Blount, 117 W. Haya.
[fol. 5] Donald I. Simpkinson, 3703 Horatio.
Howell P. Dale, 507 N. Walker St., Plant City.
Thomas E. Higgins, 5121 N. Rome Ave.
Derwood L. Carroll, 3913 Bay Court.
Geo. A. Rodriquez, 1014 33rd Ave.
Maurice C. Corma, 705 Lake Ave.
Leo A. Lastinger, 312 E. Jean St.
John H. Knight, Rt. 1, Box 12, Wimauma, Fla.
Oscar L. Mitchell, 3907 W. Buffalo.
Carl J. Rau, Box 8, Plant City.
Edgar Parson, 2709 13th Ave.
Ralph Sanders, 8205 Lynn Ave.
Benj. H. Mendelsohn, 8516 Hanner.
W. Lee Ward, 3328 N. San Miguel.
Chas. R. Gist, 4105 Obispo.
James W. Hingley, 9416 N. Blvd.
Crecy H. Walters, P.O. Box 302, Plant City.
Johnnie O. Driggers, 3606 W. Clark Cir.
Ralph H. Kelley, 3911 El Prado.
Leslie Legrande, 207 S. Fremont.
Leon Oaks, 8313 Klondyke.
Samuel R. Montgomery, Rt. 1, Ruskin.
Robt. A. Dolan, 4619 Longfellow.
Clarence B. Nuckols, 813 W. Mahoney St., Plant City.
W. Chas. Scott, 5115 N. MacDill.
John H. Shea, 3715 San Pedro.
[fol. 6] Wm. E. Arnold, Rt. 6, Box 613 "G", Tpa.
Elvin W. D'Angelo, 3013 Florida Ave.
Noel J. Dupuis, 8708 Orangeview.
Mathew Gomez, 504 E. Emily.

Buren Brown, 110 Drew St., Plant City.
Dallas B. Hundley, 210 S. Woodlyn.
Francis E. Hatchell, 2913 San Nicholas.
Hugh H. Buerke, 907 Cornelius.
John Steinlen, Rt. 5, Box 556, Tampa.
Chas. F. Dolcater, 8313½ 12th St.
Thaddeus W. McConnell, 8709 Greenwood.
Herman E. Lenoir, 10714 Edgewater.
Jos. C. Norton, 5608 Rivershores Way.
J. Monroe McNatt, 915 W. Braddock.
John G. Traina, 2136 Beach.

and ordered the Clerk to issue a venire returnable at 2:00 o'clock P.M. December 16, 1957, which was done.

[fol. 7] IN THE CRIMINAL COURT OF RECORD OF THE COUNTY OF HILLSBOROUGH AND STATE OF FLORIDA

AMENDED CHALLENGE TO JURY PANEL—Filed December 2, 1957

Comes now the defendant, Gwendolyn Hoyt, by her undersigned attorneys and moves the Court to quash the jury panel which has been empaneled as prospective jurors in the above entitled matter upon the following grounds:

A. (1) That the names of eligible women were unlawfully, arbitrarily, systematically and intentionally excluded from the list that the above referred to jury panel was drawn from.

(2) That the present jury panel was drawn from a list compiled by the jury commission and approved by the Circuit Court on March 8, 1957, order approving same being recorded in Circuit Court Minute Book 118 at Page 448; that the aforesaid list consisted of 10,000 names; that the aforesaid 10,000 names included the names of approximately 10 to 15 women.

(3) That there was at the time of the compilation of said list by the jury commission approximatley 275 women registered for jury duty with the Clerk of the Circuit Court as required by Florida Statute Section 40.01 (1) for the qualification of women jurors.

(4) That the jury commission failed to comply with

Florida Statute Section 40.01 (1) by unlawfully arbitrarily, [fol. 8] systematically and intentionally excluding the names of qualified women from the aforesaid jury list.

(5) That by reason of the aforesaid this defendant will be denied her constitutional rights under the Florida Constitution Declaration of Rights sections 11 and 12 and under the 5th, 6th and 14th Amendments to the Federal Constitution, if she is forced to proceed to trial with the present jury panel.

B. (1) That the above referred to list from which the present jury panel was drawn comprising 10,000 names was purportedly compiled by the jury commission in compliance with Florida Statute Section 40.01 (1) which is as follows:

> "Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one years, who are citizens of this state, and who have resided in the state for one year and in their respective counties for six months, and who are duly qualified electors of their repective counties; *provided, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list*".

(2) That the last portion of the aforesaid Statute 40.01 (1)

> "*Provided, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list*"

is contrary to the Florida Constitution Declaration of [fol. 9] Rights Sections 11 and 12 which are as follows:

> Section 11—"In all criminal prosecutions, the accused shall have the right to a speedy and public trial, *by an impartial jury*, in the county where the crime was committed, and shall be heard by himself, or counsel, or both, to demand the nature and cause of the accusation against him, to meet the witnesses against him face to face, and have compulsory process for the attendance of witnesses in his favor, and shall be furnished with a copy of the indictment against him".

Section 12—"No person shall be subject to be twice put in jeopardy for the same offense, nor compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property without due process of law;* nor shall private property be taken without just compensation".

(3) That the aforesaid portion of the Florida Statute Section 40.01 (1)

> "*Provided, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list*"

is contrary and in direct conflict with the Constitution of the United States of America, Amendments V, VI, and XIV which are as follows:

Amendment V—"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property without due process of law;* nor shall private [fol. 10] property be taken for public use, without just compensation"

Amendment VI—"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the State and district wherein the crime shall have been committed,* which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense".

Amendment XIV—"All persons born or naturalized in the United States, and subject to the jurisdiction there-

of, are citizens of the United States and of the State wherein they reside. ***No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law".***

(4) That the aforesaid jury list of 10,000 names was taken by the jury commission from the qualified voters list of Hillsborough County, Florida; that the qualified voters list contained 114,237 individual names on June 1, 1957; that of the aforesaid number (114,247) approximately 40% or 45,698 were women.

(5) That the defendant is a woman charged with the second degree murder of her husband; that the facts are such that the killing of the deceased was done out of passion; that the defendant is entitled under the Florida and Federal Constitutions (supra) to be tried by a jury drawn from a list containing 40% female names; that the defend [fol. 11-12] **ant will be discriminated against if forced to trial by jury with an all male panel who do not have the same passions and understanding of females and their feelings as other women would have.**

Wherefore, the defendant prays:

(1) That pursuant to Florida Statute Section 913.01, the Court set a date for hearing and the taking of testimony upon the challenge to the jury panel and that the defendant be given an opportunity to present testimony and facts to prove said challenge.

(2) That the Court dismiss the jury panel and order the jury commission to compile a jury list in compliance with the valid Florida Statutes and the Florida Constitution Declaration of Rights sections 11 and 12 and the Federal Constitution 5th, 6th and 14th Amendments.

C. J. Hardee, Jr., Hardee & Ott, 308 Tampa Street, Tampa, Florida and Carl C. Durrance, 217 North Franklin Street, Tampa, Florida, Attorneys for Defendant. By: s Carl C. Durrance.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 13] IN THE CRIMINAL COURT OF RECORD OF THE COUNTY OF HILLSBOROUGH AND STATE OF FLORIDA

No. 46464

THE STATE OF FLORIDA,

vs.

GWENDOLYN HOYT

Transcript of Hearing—December 5, 1957

This cause came on for hearing before the Honorable L. A. Grayson, Judge, in Chambers, upon Defendant's Amended Challenge To Jury Panel, on December 5, 1957, as follows:

APPEARANCES:

Hon. Harry M. Hobbs, Assistant County Solicitor, in behalf of the State;

Carl C. Durrance, Esq., 217 N. Franklin Street, Tampa, Florida, in behalf of the Defendant.

[fol. 14] Mr. Durrance: If your Honor please, this is an amended challenge to jury panel, the original challenge having been filed to the jury at the time that this case was set for trial. This is now set for trial on December 17. This is an amended challenge to this particular jury panel. In pursuance of that, if the Court so desires, I'll read it to the Court.

The Court: I'm reading it.

Mr. Durrance: Has your Honor read the full motion?

The Court: Yes.

Mr. Durrance: Your Honor please, this motion is set up in two parts. Part A: We feel that under that particular part of the motion, it will be necessary to take testimony of certain people. We have subpoenaed those people here and at this time we'll proceed to call them, if it's agreeable with the Court.

The Court: Go ahead.

Whereupon, JAMES H. LOCKHART was called as a witness by the defense and having been duly sworn, testified as follows:

Direct examination.

By Mr. DURRANCE:

Q. Please state your name.

[fol. 15] A. James H. Lockhart.

Q. Mr. Lockhart, will you describe the procedure—Do you hold any official position in the County of Hillsborough?

A. I'm a member of the Hillsborough County Jury Commission.

Q. A member of the Hillsborough County Jury Commission?

A. That's right.

Q. How long have you been a member of the Jury Commission?

A. Well, I was on for about twelve years and I was off four. I think I have been back on now about three, three-and-a-half, something like that.

Q. Were you a member of the Jury Commission on March 8, 1957?

A. That's right. Yes, sir.

Q. You were a member of the Jury Commission, then, that made up the present jury list from which this particular panel was drawn from, is that correct?

A. Yes, sir.

Q. All right. Will you then describe the procedure for making up that jury list to us?

A. Well, about two years ago, or more, the Legislature passed a law making a list of 10,000 names and the Circuit Judges told us we had to put a list in the box of 10,000 names each year. And when the Clerk—also give us help [fol. 16] from the Clerk of the Circuit Court to make up these lists that when they were made up two years ago, as the Clerk finished them, he give us a copy of them. We went over the list and checked them and sent them back and she compiled a list. Then, in '57, it was only about a little over 3,000 used in '56, therefore we had about 7,000 names left and we, she checked over the list to see if there was anybody had moved or died from the registration list. See, it had to be checked with the registration list.

Q. Now, Mr. Lockhart, do I understand that the Clerk made up the list and then submitted it to you? Is that the way it was prepared?

A. Yes, because two years ago, you know, we checked the list, see, those copies that were taken off the registration list, and we checked them. I remember, I checked them through the City Directory, checked and rechecked them.

Q. Now, how do you choose the individual names? On what basis are those chosen?

A. Well, they consider the age, the occupation, might be a freeholder, something along that line.

Q. All right. Now, when was the present list, that is, the one from which the jury panel has been drawn to try the present case which is set for December 17, when was that list compiled?

A. Well, it was compiled during the year. I think it [fol. 17] was put in the box sometime around February or March. The State Law says we have to have it in by March 31, I believe.

Q. Then, it would have been about March 8, 1957?

A. I think we put it in before then because it was up to the Judges of the Circuit Court.

Q. Now, on that particular list which you placed 10,000 names in the Jury Box, Mr. Lockhart, did the Clerk prepare that list for you? Did the Clerk of the Circuit Court prepare that list for you?

A. Help from the Clerk's office, the Clerk of the Circuit Court, made up the list, typewritten list.

Q. Was that list then submitted by the Clerk to you for your approval?

A. No. We give it to the Circuit Judges.

Q. But, did you go over the list yourself?

A. Yes, we went over. I checked, went through it, of course. We previously checked the names before, you know. Then, when the first list was made up of 10,000 names.

Q. Well, I don't quite understand what you mean by that, that you had previously checked it.

A. Well, as the list was made up, under that new law of 10,000 names, we got copies as it was made up and we took it and checked it. Mr. Duke was on the Commission

at that time and he checked part of it and I checked part of it.

[fol. 18] Q. In other words, you checked the original that was in that box, in other words, the first time you put 10,000 names in the box? You did check the list of 10,000, is that correct?

A. Prior to putting it in the box, yes.

Q. All right. Then, some of those names were still left in the box at the time that you refilled it on March 8, 1957?

A. Well, we don't refill the box or empty the box.

Q. Well, what do you do?

A. I think the Sheriff's office and the County Judge and someone else looks after that. I don't know. We give the list to the Circuit Judges and they approve it and then they turn it over to the Clerk of the Circuit Court, I believe.

Q. I see.

The Court: When you gave it to them, Jimmy, it's in a typewritten page with these names there in it?

The Witness: That's right.

Q. In other words, Mr. Lockhart, you just prepare the list?

A. That's correct.

Q. Is that correct?

A. And it has to be approved by the Circuit Judge.

Q. Yes, sir. All right. Now, this particular list that [fol. 19] was prepared on March 8, 1957, the same one that this particular panel was drawn from, what I want to get clear is whether or not the Clerk prepared that list and then submitted it to you for your approval?

A. We looked it over before she typed it up and then present it to the Judge, Circuit Judges. See, the list is practically the names were dwarn, I mean, made up in the year before because the Circuit Judges ruled that they had to be 10,000 names put in the box each year.

Q. All right, sir. But what I want to know, specifically, Mr. Lockhart, if I can, please, is this particular list, on March 8, 1957, was that tentatively prepared by the Clerk and then submitted to you for your approval along with Mr. Conner, the other Jury Commissioner?

A. Yes. It was made up, of course, it was made up

from the one the year before that we had already gone over.

Q. Made up from that list.

A. See, we have a box down there we keep the names in. As the jurors are pulled, they are transferred from that box into the other box, to show they are being drawn.

Q. All right, sir. How many names were placed on the list on March 8, 1957?

A. Approximately 10,000 names. We didn't count the exact number but we had it a little under 10,000 names because I understand the Judges said they didn't want to go over the amount.

[fol. 20] Q. How many women or female names went into this list?

A. On the 1957 list, it was ten, I believe.

Q. So, then, in this jury panel list which you prepared and from which this present panel was drawn from, there were ten women, or female names that went on that list, is that correct?

A. That's right.

Q. All right. How many eligible women or female names are there in the registration book in the Clerk of the Circuit Court's office left there for that purpose?

A. The Act was created in 1947, I believe. There have been registered since, about 220 names and from 1952, on, I don't believe there has been more than 35 names been put on the list.

Q. All right. Now, getting back to March 8, 1957, how many eligible female women were registered in that book?

A. Well, I don't know how many were qualified, but they have the names on there of about 220.

Q. Approximately 220?

A. As I say, from 1952, on, since I went back on the second time, there has only been about 35 that has registered with the Clerk of the Circuit Court.

Q. All right, sir. Now, were there any eligible female names left off of this jury list which you've prepared?

A. There probably were.

Q. On March 8, 1957?

[fol. 21] A. From the last four years, we have been averaging about ten to twelve on each list.

Q. All right. Why is that, Mr. Lockhart?

A. Because since 1952, there has only been about 30, 35 that's qualified to, I mean, went down and registered for jury duty. You don't have much to choose from.

Q. Well, now, how do you select women's names from that registration book?

A. Well, we just have to take the names on there, that's all.

Q. Well, you've used some system with reference to that book, do you not?

A. Well, we try to check them through. They did before this last year. I tried to check them through the City Directory. You'll find that a good many of the women folks now are over 65. In fact, one of them is approximately eighty.

Q. What I am trying to get at, Mr. Lockhart, is this. If there were only ten women's names, as you testified, went into the present jury list and there were at the time about 220 eligible women who had registered for jury service, why the difference between ten and 220 which were apparently eligible?

A. Well, they have been put over a spread of years.

Q. Well, how do you do that?

A. Well, every year, there is a new jury list and we [fol. 22] put on ten or twelve every jury list. In fact, along seven or eight years ago, it was pretty hard to see whether—the status changed so rapidly, it was pretty hard to know whether they would be qualified or not.

Q. Would I be correct, then, in saying that you omitted approximately 210 eligible women's names when you compiled this list?

A. I wouldn't say they were eligible because we didn't check them. We don't check every name on the registration books.

Q. I'm talking about this registration book in the Clerk of the Circuit Court's office, Mr. Lockhart, where the women are required to come there and register for jury duty?

A. You can say it's 220 names on that book. There is.

Q. All right. If there are 220 eligible women on that book——

A. I don't know if they are eligible or not.

Q. What I want to know, then, is why you picked just ten out of that 220 to go into this jury list?

A. Well, we picked—we have average, for the last four years, ten to twelve on each list.

The Court: Let's get off the record a minute.

(Discussion off the record.)

The Court: Go ahead.

Q. Mr. Lockhart, in making up this list, jury list, from [fol. 23] which the present panel was drawn, did you attempt to comply with Florida Statute, Section 40.01, sub-section (1), in making up that list?

A. Would you mind reading it to me?

Q. Well, that's the Statute, Mr. Lockhart, governing the qualifications for jurors and I will read it, if you like. Florida Statute, Section 40.01, sub-section (1), is as follows: "Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one years who are citizens of this state and who have resided in the State for one year and in their respective counties for six months, and who are duly qualified electors of their respective counties, providing, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list." Now, what I am asking, Mr. Lockhart, is, did you purport to comply with that statute when you prepared this jury list?

A. Yes, sir.

Q. All right. Did you put in this list on March 8, 1957, any women or female's names who were registered voters but who had not registered with the Clerk of the Circuit Court?

A. If it was there, we didn't intend to. We checked the registration. The law requires that to be on registration. [fol. 24] Q. In other words, you would say that you did not?

A. Yes. That's right. I doubt what, with that small number of names. They were checked with the registration office.

Mr. Durrance: All right, sir. Your witness.

Cross-examination.

By Mr. Hobbs:

Q. How do you tell male from female on your jury list?

A. Well, all the females are supposed to be registered down in the Clerk's office. Then, they have a column in the registration book that says male or female.

Mr. Hobbs: That's all.

Mr. Durrance: That's all, Mr. Lockhart.

Whereupon, KATHERINE L. McPHILLIPS, was called as a witness by the defense, and having been duly sworn, testified as follows:

Direct-examination.

By Mr. Durrance:

Q. Please state your name.

A. Katherine L. McPhillips.

Q. Mrs. McPhillips, what is your employment?

A. I'm a clerk in the Clerk of the Circuit Court's office.

Q. Were you so employed on March 8, 1957?

A. Yes, I was.

[fol. 25] Q. How long have you been employed in the Clerk of the Circuit Court's office?

A. I'd say a year and a half. I believe it was in June, 1956.

Q. What are your duties with the Clerk of the Circuit Court's office? Let me ask you this question: Do you have any connection with the Jury Commission of Hillsborough County, in any way?

A. Yes, I do.

Q. Will you explain that to us?

A. Yes. I make up the list that goes into the jury box.

Q. All right. Now, on March 8, 1957, when the jury list was made up from which the present panel has been drawn, did you prepare that list?

A. Yes, I did.

Q. Will you tell us what procedure you used?

A. In making up the list?

Q. Yes.

A. Well, I used the list from my card index file that I'd made in 1956 and added approximately 2500 names more from Mr. Dekle's Registration Office List.

Q. All right. Then, what did you do with that list after you made it up?

A. I submitted the list to Mr. Lockhart.

Q. Did he approve this list that you submitted to him? [fol. 26] Did he approve it?

A. Well, he didn't say anything to me, one way or another, about it.

Q. I see.

By the Court:

Q. Did you get it back disapproved?

A. No, sir, I did not.

By Mr. Durrance:

Q. Now, let me ask you this, Mrs. McPhillips. In compiling that list, how many women's names went into that list?

A. Ten.

Q. How did you arrive at—strike that question, please. Mrs. McPhillips, I hand you a book here which purports to be a book containing the names of female—a book kept by the Clerk of the Circuit Court for the purpose of women to register in order to qualify for jury service. Is that the book which is kept by the Clerk of the Circuit Court of Hillsborough County for the registration of women jurors?

A. Yes, it is.

Q. All right. Did you use that particular book in making up the list which you submitted to Mr. Lockhart of the Jury Commission?

A. Yes, I did.

Q. How many eligible women are there in that particular [fol. 27] book, or were there, on March 8, 1957, we'll say?

A. Two hundred eighteen.

Q. And there were ten names, ten female names which went on to this jury list of 10,000?

A. Right.

Q. Why was there only ten out of the 218 placed on the list?

A. Well, the reason I placed ten is I went back two or three, four years, and noticed how many women they had put on before and I put on approximately the same number.

Q. Did you receive any instructions with reference to that from Mr. Lockhart?

A. Mr. Lockhart told me at one time to go back approximately two or three years to get the names because they were recent women that had signed up, because in this book, there are no dates at the beginning of it, so we can't—I don't know exactly how far back they do go and so I just went back two or three years to get my names.

Q. All right. Would you say, then, that there were approximately 208 eligible women whose names were left off of this particular jury list on March 8, 1957?

A. Approximately that, sir. Yes.

Mr. Durrance: I believe that's all from this witness. Do you have anything, Harry?

[fol. 28] Cross-examination.

By Mr. Hobbs:

Q. You say you added 2500 names to the list that you already had, is that right?

A. Yes, sir.

Q. Then, part of that 2500 was ten women's names, is that right?

A. Yes.

Q. At that time, you already had a list of approximately 7,500?

A. That's right. We had to have 10,000 altogether.

Q. How many women's names were in that 7,500?

A. Ten.

Q. How do you know it was ten in the 7,500?

A. Oh, you mean, how do I know there were ten left in the 7,000 names? Well, I'm not sure. I don't know.

Q. You don't know how many women's names were in that 7,500, do you?

A. No.

Q. All you know is that in putting up the additional 2500, you put ten women's names in it?

A. Yes.

By the Court:

Q. Had you made the list from which the first 10,000 were put in the box?

A. Yes, sir.

[fol. 29] Q. Well, you put approximately the same percentage of women in that you did in that last one?

A. Yes, sir.

Q. Then, there would have been the residue in that 7,000?

A. Oh, I see what you are getting at.

Q. There would be the residue of the ten that hadn't been drawn out?

A. There were ten left in the box.

Q. Well, you don't know what was in the box. There had been ten put in?

A. But I don't know how many were left.

Q. And these that hadn't been drawn out were still there?

A. That's right, sir.

Q. So, the residue of the ten that you put in there originally was still in there?

A. That's right, sir.

Q. And, then, you added ten more with the 2500?

A. No, sir. There were not ten more added.

Q. There were not?

A. There ten altogether that were on this 1957 list.

Q. This box, lady, has been filled twice, hasn't it?

A. That's right.

Q. All right. Were there 20,000 different names used, 10,000 each year?

[fol. 30] A. No, sir, there were not.

Q. Isn't this the way the thing worked? When you first had to put in 10,000, you put in ten. At the end of the year, about 3,000 had been used?

A. Yes, sir.

Q. You had the residue of the ten, of around 7,000?

A. That's right.

Q. You added 2500 more to that to bring it up in the neighborhood of 10,000 again?

A. That's right.

Q. In the 10,000 that you originally put in, there were ten women?

A. That's right, sir.

Q. In the 2500 that you added, were there any new women added?

A. No. There were no new women added.

Q. No new women added at all?

A. No. Just the ones that were in the box still of the 7,000.

Redirect examination.

By Mr. Durrance:

Q. So, then, on March 8, 1957, no women's names were added to this jury list?

A. Well, they weren't added, no. We just used the ones we had.

The Court: Now, wait a minute.

[fol. 31] By the Court:

Q. Did you put any more jury women into the 2500?

A. No, sir.

Q. Well, the answer was that they were not added?

A. No, sir.

Recross-examination.

By Mr. Hobbs:

Q. In putting this in March 8, you didn't pay a bit of attention to this list at all? You didn't use this list at all?

A. No. We just used the women that were left in the box.

Redirect examination.

By Mr. Durrance:

Q. In other words, you did not use this book which you have at the present time which the Clerk keeps downstairs for the registration of women who desire to serve on the jury? You did not use that book when you added these 2500 names on March 8, 1957?

A. No.

Mr. Durrance: That's all.
The Witness: Except——
Mr. Hobbs: Wait a minute.

Recross-examination.

By Mr. Hobbs:

Q. A minute ago you testified that each year you put [fol. 32] ten additional names in there because they had used ten before?

The Court: Female names.

Q. Female names.

A. Yes, sir.

Q. What did you mean by that? I don't understand that.

A. What I mean is that we had ten women in the 7,000 left that had not served. Had not served. So, we did not take their names out of the box, or out of the file that we use to compile the list and put them in a "Served" file. So, we still had ten ladies' names left in the box from the 1956 list.

By the Court:

Q. If they hadn't been drawn out?

A. That's right.

Q. You don't know what ladies' names were in the box, then?

A. I can't say, for sure.

Q. But you didn't add any new ones?

A. Now, to my knowledge, there were none. I would have to check it for sure. That was a year ago. Now, I would have to—I can't absolutely state, one way or another.

Q. Is the information available?

A. Yes, sir, it is. May I look in this?

Mr. Durrance: Sure. Sure. I want you to.

[fol. 33] A. Now, here is one lady that went in, again.

Q. Let's confine ourselves, now, to the 2500 that you added to bring this back up to 10,000. Was the one that you mentioned there added within the 2500?

A. You mean, the original list I made up of 10,000?

Q. Lady, I don't know what you call the original list. You have made up two lists of 10,000, haven't you?

A. Yes, sir.

Q. Only two, under this new jury law?

A. That's right, sir.

Q. We are speaking now of the second 10,000.

A. Yes, sir.

Q. That's the residue of the first ten, plus the 2500 odd that you put in?

A. Yes.

Q. That's the 10,000 we are talking about.

A. The second 10,000.

Q. Right.

The Court: Isn't it?

Mr. Durrance: Yes, sir.

The Court: That's the one that this jury came from.

Mr. Durrance: Yes, sir. That's the one we are interested in.

A. The only way I can be absolutely sure about that is to check.

[fol. 34] Q. Where would you check?

A. I would check against the 1957 jury list and against these names that signed up after—I mean, in 1956. You see what I mean?

Mr. Durrance: All right. Would you check that for us and submit that to us in writing in order that we may place it into the record?

The Witness: Yes, sir.

Mr. Durrance: Is that agreeable with you, Harry?

Mr. Hobbs: I don't know what she is going to submit in writing. I've no idea. I don't know how I can agree to it until I see the writing.

The Witness: One other reason why I have to check this, too. Another girl helps me with the jury list and whether she did or not, I'm not positive, either. That's another reason I'll have to check this.

By Mr. Hobbs:

Q. Do you still have a list of the people that you put in the jury?

A. Oh, yes.

Q. And on that list, do you have——

The Court: It wouldn't take you too long to find ten women in a crowd of a list of 2500, would it?

[fol. 35] The Witness: No, sir, it wouldn't take me any time at all.

Q. How would you determine whether they were male or female on that list?

A. The way I am going to determine whether I put, whether any women were put on in 1957 or not is by this book. If any of these names down here have been used on that 1957 list.

The Court: What you will do is go through the 1957 list and select the names that you suspect of being female and then check them against that book?

The Witness: That's right, sir. That's the only way I can determine.

The Court: Now, some of them, I can't tell. I have pulled them out and I can't tell, by the name, whether they are male or female. Of course, when they came in the court room, I readily caught on.

Mr. Durrance: How long would it take you to check that, Mrs. McPhillips?

The Witness: It would take me about ten minutes, by alphabetical order.

Mr. Durrance: Would you like to do that now and come back?

The Witness: Be glad to.

[fol. 36] Mr. Durrance: Is that all right?

The Court: It's all right for her to do it. Now, when she comes back, I won't be here.

The Witness: Do you want me to go down now and check this?

Mr. Durrance: I would like for you to check it, Mrs. McPhillips.

Mr. Hobbs: After she checks it, you and I may sit down and stipulate as to what her check showed.

The Court: Suppose you do that, then.
The Witness: All right, sir.

(The witness left the room.)

Whereupon, JOHN C. DEKLE, was called as a witness by the defense and having been duly sworn, testified as follows:

Direct-examination.

By Mr. Durrance:

Q. Please state your name.
A. John C. Dekle, Supervisor of Registration, Hillsborough County, Florida.
Q. Mr. Dekle, are you familiar, in your official capacity, with the number of voters in Hillsborough County at the present time?
A. Yes, sir.
[fol. 37] Q. How many are there?
A. At the present, the last count was in June of this year, 1957. It was a total of 114,247 grand total, qualified voters.
Q. Now, what ratio, Mr. Dekle, of women to men are there in the qualified voters list?
A. Well, a breakdown at that time shows about 60-40 ratio. There would be about 46,000 women registered of that total, 114,000. It would run about 60-40.
Q. So, there were approximately, your best estimation, 46,000?
A. Approximately 46,000 women registered.
Q. On what date was that, June?
A. June 1, 1957, was the last breakdown.
Q. Would that have varied any substantial difference on March 8, 1957? Would it have been practically the same?
A. It would have been the same. There wasn't any variation between March and June.

Mr. Durrance: It would have been no variation at all. Your witness.

Cross-examination.

By Mr. Hobbs:

Q. You don't know the percentage of women versus men living in Hillsborough County, do you?

A. No, I don't.

Q. You have no figures on that?

[fol. 38] A. No. All we have is on registration.

Mr. Hobbs: I have no further questions.

(The witness was excused.)

Mr. Durrance: Your Honor please, that's all the testimony which we have at this time. Of course, Mrs. McPhillips will have some additional testimony for us within a short time, apparently. Do you want to hear any argument at this time, or what?

The Court: If you want to argue.

(After hearing argument by counsel, the following occurred:)

STATEMENT BY THE COURT

The Court: As to the subdivision A of your motion or your challenge, according to the testimony, as I understand it, there are 68,000 eligible male jurors in the county and, assuming for our present purposes that the Statute requiring the registration of women who want to be jurors is a valid Statute, there are 275 eligible female jurors. Of the 10,000 in the box, there are approximately ten women and the balance are men. On the eligibility list, that would represent about 27 per cent of the eligible women and about 15 per cent of the eligible men, so I believe, percentage-wise, on Ground A, that there certainly isn't any discrimination of the nature of which you complain. Percentage-wise, [fol. 39] there are more women in the box or there were more women put in the box, however many there may or may not be now, percentage-wise, than there were men.

Now, you come to your proposition B, which is the invalidity of the Statute. I'm going to hold against you on that because if as basic a proposition as this attack is, it seems to me we ought to have the Appellate Court first to declare the act unconstitutional, if it is unconstitutional.

Throughout our entire history—and while some of our higher courts seem to pay no regard whatever to tradition, it's something you can't entirely disregard—women have been treated as superior to men, until they sought to get equal rights and got brought down to our level. They are now our equals and no longer our superiors. It may be that the Court will finally determine that that Statute is invalid. I don't think it is. I think it is a proper regulation from a standpoint of law. I think it's unwise, but that's a different thing from invalid. Frankly, I know of no reason why there should be any restriction at all upon women acting as jurors, any more than there is upon men. [fol. 40] But, I don't believe that the unwisdom of the Legislature is a matter which should go to the validity of a law and I am, therefore, going to deny your challenge in its entirety.

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 41] STATEMENT OF MRS. KATHERINE L. MCPHILLIPS AND CERTIFICATE THERETO

This is Katherine L. McPhillips and pursuant to the statement that I made in Judge Grayson's office the other day, I came down and checked my jury records and found that no names of women had been added to the 2500 names that were added to complete the 10,000 names of the 1957 jury list. In the case of Gwendolyn Hoyt.

STATE OF FLORIDA,
County of Hillsborough.

I, Virginia Toffaletti, do hereby certify that I was authorized to and did report in shorthand statement by Katherine L. McPhillips in reference to the case of the State of Florida v. Gwendolyn Hoyt #46464, on December 10, 1957; and that the foregoing is a true and correct transcription of my shorthand report.

In Witness Whereof, I have hereunto affixed my hand this 10th day of December, A.D. 1957.

s/ Virginia Toffaletti, Official Court Reporter.

[fol. 42] IN THE CRIMINAL COURT OF RECORD OF THE COUNTY OF HILLSBOROUGH AND STATE OF FLORIDA

MINUTE ENTRY OF ORDER DENYING AMENDED CHALLENGE TO JURY PANEL—December 5, 1957

Come now Assistant County Solicitor, Harry M. Hobbs, and the defendant, Gwendolyn Hoyt, by her counsel, Carl Durrance and C. J. Hardee, Jr., and present to the Court Amended Challenge to Jury Panel, which the Court denied in words and figures as follows:

Motion Heard, Considered and Denied. Exception Noted this Dec. 5, 1957.

s/L. A. Grayson, Judge.

[fol. 43] IN THE CRIMINAL COURT OF RECORD OF THE COUNTY OF HILLSBOROUGH AND STATE OF FLORIDA

ADDITIONAL CHALLENGE TO JURY PANEL—Filed December 12, 1957

Comes now the defendant, Gwendolyn Hoyt, by her undersigned attorneys and files this her additional challenge to the jury panel which has been empaneled as prospective jurors in the above entitled matter and says:

C. (1) That Florida Statute Section 40.10 which is as follows:

> "The jury commissioners in counties described in 40.09 shall select and list 10,000 inhabitants of such county known or believed to be qualified under the law to be jurors who, even if exempt, have not filed a written claim of exemption from jury duty as hereinafter provided. No juror's name shall be drawn twice for jury duty until the above list has been exhausted. In making the selections and preparation of said lists, the jury commissioners may confer with the judge or one or more of the judges of the circuit court of such county, and shall have the power, without charge or cost, to examine, at any reasonable time all documents and records in the office of the clerk of the circuit court and of any other county officials as to persons who have been listed, summoned, not found, served or excused as jurors, and all books, records, and lists in the office of

the supervisor of registration or other county official containing the names of electors of such county. The clerk of the circuit court shall furnish or cause to be furnished the necessary clerical aid to the commission."

requires the jury commissioners to select and list 10,000 inhabitants for jury duty.

(2) That on December 5, 1957 James H. Lockhart one of the jury commissioners of Hillsborough County, Florida, testified before this honorable court that the jury list [fol. 44] from which the present jury panel was drawn was made up by an employee of the clerk of the circuit courts office of Hillsborough County and that said list was then submitted to the jury commission of Hillsborough County for their approval and was subsequently submitted to the circuit court of Hillsborough County by said commissioners. Copy of said testimony having been heretofore filed with this honorable court.

That on December 5, 1957 Kathryn L. McPhillips testified before this honorable court that she was employed as a clerk in the clerk of the circuit court's office of Hillsborough County and that she made up the list which went into the jury box from which the present panel was drawn. The said Kathryn L. McPhillips further testified that after she had made up the said list she submitted the same to the jury commission of Hillsborough County, Florida for their approval. Copy of said testimony having been heretofore filed with this honorable court.

That by reason of the foregoing the jury commissioners of Hillsborough County, Florida failed to comply with the Florida Law and Statutes and that by reason thereof the present jury panel should be quashed.

WHEREFORE the defendant prays that this honorable court quash the jury panel which has been empaneled as prospective jurors for the trial of this cause.

C. J. Hardee, Jr., Hardee & Ott, 308 Tampa Street, [fol. 45] Tampa, Florida and Carl C. Durrance, 217 North Franklin Street, Tampa, Florida, Attorneys for Defendant, By s/ Carl C. Durrance.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 46] IN THE CRIMINAL COURT OF RECORD OF THE COUNTY OF HILLSBOROUGH AND STATE OF FLORIDA

MINUTE ENTRY OF ORDER DENYING ADDITIONAL CHALLENGE TO JURY PANEL—December 17, 1957

Come now County Solcitor, Paul B. Johnson, and the defendant, Gwendolyn Hoyt, with her counsel, Carl Durrance, and C. Jay Hardee, Jr., and present to the Court Additional Challenge to Jury Panel, which the Court denied in words and figures as follows:

Motion Heard, Considered and Denied. Exception Noted this Dec. 17, 1957.

s/ L. A. Grayson, Judge.

[fol. 47] IN THE CRIMINAL COURT OF RECORD OF THE COUNTY OF HILLSBOROUGH AND STATE OF FLORIDA

MINUTE ENTRY OF ARRAIGNMENT AND PLEA—December 17, 1957

And the defendant, Gwendolyn Hoyt, waived arraignment, and entered a plea of not guilty as charged in the information, and a plea of not guilty by reason of temporary insanity, as charged in the information.

[fol. 48] IN THE CRIMINAL COURT OF RECORD OF THE COUNTY OF HILLSBOROUGH AND STATE OF FLORIDA

MINUTE ENTRY OF VERDICT OF THE JURY

Tampa, Florida, Dec. 19, 1957.

We, the Jury, find the defendant Gwendolyn Hoyt guilty of Murder, 2nd Degree as charged in the information. So say we all.

s W. LEE WARD, Foreman.

It is Considered, Ordered and Adjudged by the Court that the defendant, Gwendolyn Hoyt, is guilty as charged in the information, and the Court deferred the passing of sentence at present.

(Defense counsel given 15 days in which to file Motion for New Trial)

[fol. 49] IN THE CRIMINAL COURT OF RECORD OF THE COUNTY OF HILLSBOROUGH AND STATE OF FLORIDA

JUDGMENT, ORDER AND SENTENCE—January 20, 1958

Come now County Solicitor, Paul B. Johnson, and the defendant, Gwendolyn Hoyt, with her counsel, Carl C. Durrance and C. J. Hardee, Jr., and having been heretofore convicted by a jury as charged in the information, and having been adjudged guilty by the Court as charged in the information,

Now on this day came in person the defendant, Gwendolyn Hoyt, and being asked by the Court whether she had anything to say why the sentence of the law should not now be pronounced upon her, says nothing.

It is therefore, the Judgment, Order and Sentence of the Court, that you, Gwendolyn Hoyt, for the crime of which you have been and stand convicted, be imprisoned in the State Penitentiary of the State of Florida at hard labor for a period of Thirty (30) years, from date of your delivery to the officers thereof.

[fol. 50] IN THE CRIMINAL COURT OF RECORD OF THE COUNTY OF HILLSBOROUGH AND STATE OF FLORIDA

ASSIGNMENTS OF ERROR AND GROUNDS OF APPEAL—Filed June 5, 1958

Now comes the defendant, Gwendolyn Hoyt, by her undersigned attorneys, within the time fixed by order of the Court, and filed this her assignments of error and grounds of appeal, intended to be relied upon in the Supreme Court, as follows:

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4. The trial court erred in denying the defendant's amended challenge to the Jury Panel upon the grounds stated in said challenge.

5. The trial court erred in denying the defendant's addi-
[fol. 51] tional challenge to the Jury Panel upon the grounds stated in said additional challenge.

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[fol. 52] IN THE SUPREME COURT OF FLORIDA, JULY TERM, 1959

Case No. 29,966

GWENDOLYN HOYT, Appellant,

vs.

THE STATE OF FLORIDA, Appellee

An Appeal from the Criminal Court of Record for Hillsborough County, L. A. Grayson, Judge.

C. J. Hardee, Jr., of Hardee & Ott and Carl C. Durrance, for Appellant.

Richard W. Ervin, Attorney General and George R. Georgieff, Assistant Attorney General, for Appellee.

OPINION FILED DECEMBER 2, 1959

DREW, J.

Gwendolyn Hoyt was indicted for second-degree murder of her husband Clarence Hoyt. She pleaded not guilty and not guilty by reason of temporary insanity, was tried and a verdict of guilty as charged was rendered by the jury.

The homicide occurred at the parties' home when appellant, after prolonged marital discord and alleged infidelities, called her husband from his military station in another city by a false report of injury to their young son. She was unable to salvage their relationship by any means, when she was so informed by the deceased in a final and [fol. 53] unequivocal fashion at the unfortunate moment when she was disposing of a damaged baseball bat, the fatal blows were struck. Immediate medical attendance could not repair the extensive head injuries which resulted in death the following day. Appellant gave a full account of events, which are not materially in dispute, indictment and trial followed in due course, and this appeal ensued.

By challenge to the all-male jury panel the appellant raised an issue as to the validity or constitutionality of Section 40.01 (1), F.S.,[1] insofar as it provides that, while

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[1] "40.01 *Qualifications and disqualifications of jurors.*—

"(1) Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one years,

jurors are to be taken from male and female electors, "the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list." The validity of the statute was sustained by the trial court. Jurisdiction of this Court is invoked to review that judgment as one "directly passing upon the validity of a state statute . . . or construing a controlling provision of the Florida or Federal Constitution."[2]

[fol. 54] The record reflects that the list of names from which the venire was chosen did contain some names of women who had registered for jury service, and that the number so included was proportionately at least a fair representation of the total number of eligible women registered for jury service. The complaint, therefore, is that the law itself, by imposing upon women a burden (voluntary registration) not imposed upon men as a requirement for being called to jury service, operates to deprive the defendant of the "impartial jury" required by Section 11, Declaration of Rights, Florida Constitution, or of "equal protection of the laws" guaranteed by Amendment XIV, United States Constitution.

Neither contention can be sustained. Courts, under laws making women eligible for jury service, have condemned the exclusion of eligible women from a jury by arbitrary administrative action, noting in this respect that their exclusion "may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded."[3] We find no instance, however, where a court has overruled a legislative determina-

who are citizens of this state, and who have resided in the state for one year and in their respective counties for six months, and who are duly qualified electors of their respective counties; provided, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list."

[2] Art. V, Sec. 4(b), Constitution of the State of Florida; Rule 2.1 a (5) (a), Fla. Rules of Appellate Procedure.

[3] Ballard v. U.S., 329 U.S. 187, 67 S.Ct. 261, Anno. 166 A.L.R. 1422, 91 L.Ed. 181.

tion, or declared invalid a constitutional provision, that women as a class should be subject to different treatment or regulations, such as those here involved, with respect to jury service. The prohibition is against the enactment or application of laws to single out a class for different treatment "not based on some reasonable classification" or basis.[4] All such decisions recognize the fact that "circumstance or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period," and that a defendant's only right is to be "tried by juries from which all members of his [fol. 55] class are not systematically excluded"—a right to juries fairly selected from among all qualified or eligible persons.[5]

None of the later opinions either expressly or impliedly abandons the early pronouncement that within certain limits the law may prescribe qualifications for jurors "and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or the persons having educational qualifications."[6] Provisions for absolute ineligibility or general exclusion of women from jury service were, of course, the universal rule in the past, grounded historically, we believe, upon the inconsistency of such demands with their role in society.[7]

From the established precedent that women as a class may be excluded altogether from this particular civic labor without depriving a defendant of any constitutional rights, it logically follows that a rule or regulation of their service is not objectionable merely because it may incidentally operate to limit the proportion of women on juries. Even if it be conceded that an impartial jury, or due process of law, includes the concept of a "representative"

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[4] Hernandez v. Texas, 347 U.S. 475, 74 S.Ct. 667; Thiel v. Southern Pacific Company, 328 U.S. 217, 66 S.Ct. 984.

[5] Hernandez v. The State of Texas, ibid.

[6] Strauder v. West Virginia, 100 U.S. 303, 25 L. Ed. 664. Fay v. New York, 332 U.S. 261, 91 L. Ed. 2043.

[7] Hall v. State, 136 Fla. 644, 187 So. 392; Bacom v. State (Fla.), 39 So. 2d 794; Anno. 157 A.L.R. 461.

jury, one is entitled under all the cited cases only to attack provisions which limit unfairly, or without a reasonable basis, his opportunity to obtain such a jury. The statute under consideration does not, in our opinion, make such an arbitrary classification or discrimination.

[fol. 56] The same functional rationale mentioned in connection with the former exclusionary rule will sustain a statutory rule, such as our present law,[8] against compulsory service after removal of eligibility barriers. Whatever changes may have taken place in the political or economic status of women in our society, nothing has yet altered the fact of their primary responsibility, as a class, for the daily welfare of the family unit upon which our civilization depends. The statute, in effect, simply recognizes that the traditional exclusion was based not upon inherent disability or incapacity but upon the premise that such demands might place an unwarranted strain upon the social and domestic structure, or result in unwilling participation by those whose conflicting duties, while not amounting to actual hardship, might yet be expected, as a general rule, to affect the quality of their service as jurors. The law vests in the individuals concerned, as those best qualified to judge, the right to decide without compulsion whether such service could be rendered without risk of impairment in their more vital role. There is an obvious distinction between such a legislative classification or rule of privilege and the case of a blanket administrative exclusion of an eligible class for supposed hardship.[9]

With respect to other objections to the manner in which the jury list was compiled, appellant has failed to show that the requirements of Chapter 40, F.S., were violated in any way. That law contains no positive mandates that [fol. 57] selections be made in any particular proportions, and the evidence does not indicate anything resembling a systematic exclusion of eligible registered female electors. Likewise the statute clearly contemplates the use of clerical assistance in the preparation of the list and does

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[8] See note (1) supra.

[9] See Thiel v. Southern Pacific Company, 328 U.S. 217, 66 S.Ct. 984.

not require more than the personal supervision and review exercised by the commissioners in this case.[10]

The assertion as made that the procedure followed in compilation of the jury list amounted to unlawful delegation of the commissioner's discretionary powers and violated certain principles referred to in our decisions. First, "they cannot by subsequently ratifying a selection made by some other person render the selection valid."[11] An investigation of the decisions upon which this text statement is based fails to reveal any case in which a court has disapproved the typing of names by an employee from specified registration lists at the direction of the commissioners, in the circumstances of this case.[12] The evil against which the rule is obviously directed is the choice of names by any "other person" in the character of a volunteer or one having even a potential interest in the procedure. The transcription of names from a specified register under direction of law or order of the commissioners does not, upon any rational theory, amount to "selection" by the transcriber or clerk, but rather the selection is in fact made by the officials directing the procedure and approving the list compiled. Similarly, their action is "in concert" if the certification of the list and the procedure by which it is produced is the result of their combined and cooperative efforts, as opposed to a list "drawn by some of the county commissioners in total [fol. 58] disregard of the counsel and advice of others."[13] Certainly the decision first above cited to the effect that a challenge may be based upon participation by parties, other than clerical assistants, who are alleged to be prejudiced to defendant and taking an active part in the prosecution of the cause, is not inconsistent with the conclusion reached in this case.

The appellant further contends that the court erred in

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[10] Cf. Chance v. State, 115 Fla. 379, 155 So. 663, construing Sec. 4444, C.G.L. 1927.

[11] Ibid, at page 664.

[12] 50 C.J.S., Juries, Section 158, p. 882; cases collected 92 A.L.R. 1109, 1112.

[13] State ex rel. Jackson v. Jordan, 101 Fla. 616, 135 So. 138 Cf. State v. Walters (Idaho), 102 P. 2d 284.

denying motion for directed verdict of acquittal upon the medical testimony as to insanity; and in refusing to find upon the evidence that the charge should as a matter of law be reduced to manslaughter. On these issues it will suffice to say that a jury question was, under former decisions of this Court, plainly presented.[14] There was no conflict in respect to appellant's medical history, reflecting affliction with epilepsy from an early age. But, while medical experts were not in full accord on all points, there was ample testimony from which a jury could find that there existed no disabling malfunction at the time of the homicide under the established rules for determination of criminal responsibility.[15]

Among the other points urged by appellant are objections to comments by court and counsel in the course of trial before the jury; objections to latitude permitted in cross examination of appellant; and alleged error in submitting the form of verdict "not guilty by reason of insanity" upon the plea of temporary insanity entered in the cause. We conclude from an exhaustive consideration of [fol. 59] the record in these respects that no prejudicial error was committed.

The objections to "hearsay" are apparently based upon the court's alleged error in admitting into evidence a memorandum made by a witness for the prosecution, Mrs. Edna Leonard, in the course of her business employment by a baby-sitting agency. Her testimony was simply that on a specified date she had occasion to make a record of a call for a baby-sitter, and (it was only upon cross examination that the caller was identified as a man) there appeared upon the face of the note the name "A. H. Bibby," a street address which was that of defendant, and the name "Mrs. Ellen Osteen," together with the name "La Motte" subsequently identified as the sitter sent on this job. Mrs. La Motte then testified that she was sent on the date in question to the specified address to baby-sit for a Mrs. Osteen, and that the woman who admitted her, and employed her to remain with a child during her absence with a man until 5:00 a.m., was the defendant.

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[14] See Warner v. State (Fla.), 84 So. 2d 314.

[15] Ibid.

The testimony in this regard was clearly within the scope of rebuttal to defendant's line of defense in general, and her statements in particular that she did nothing to contribute to the deterioration of her marital relationship, that "all I wanted to do is go live with him . . . All I did was wait for him. . . ." Evidence for the defense was directed showing a course of events affecting the marital relationship and producing in defendant such a state of mind as to relieve her from criminal responsibility for her acts. In this situation evidence of other events vitally affecting the marital relation, and bearing upon her alleged state of mind, was properly admitted in impeachment. The collateral issue as to use of fictitious names arose unavoidably in the course of the witnesses' report of the incident, and the disputed memorandum did not put before the jury any material information other than that contained in other admissible testimony.

Assuming without conceding any merit in the remaining [fol. 60] contentions, that the instructions did not specifically cover evidence of a prior conviction, and that there was error in qualifying a juror who was under prosecution for a federal offense, these cannot avail the appellant in this case who, having full knowledge or notice in both instances, failed to object or raise an issue in a proper and seasonable fashion.[16] Moreover there is no showing, or assertion, that under the circumstances any actual bias resulted.

Affirmed.

Terrell, Roberts, Thornal and O'Connell, JJ., concur.

Thomas, C. J., and Hobson, J., concur in part and dissent in part.

[fol. 61] Hobson, J., concurring in part and dissenting in part.

Although I agree with that portion of the majority opinion which holds that § 40.01(a), F.S., is valid and constitutional, I cannot agree with the judgment of affirmance

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[16] Sec. 918.10 (4), F.S. Brumke v. State, 160 Fla. 43, 33 So. 2d 226. See also Ex parte Sullivan, 155 Fla. 111, 19 So. 2d 611.

because of my belief that harmful and, therefore, reversible error has been clearly demonstrated.

The facts delineated in the majority opinion are accurate, but do not, as I see it, limn the true picture painted by the entire record of the testimony. The following facts appear to be undisputed:

Appellant, Gwendolyn Hoyt, was tried and convicted for the second degree murder of her husband by hitting him over the head with a baseball bat. The deceased was an Air Force Captain. He and appellant were married a number of years and had an eight year old son. They had been divorced once some twelve years ago and remarried. The deceased had for some time been unfaithful to his wife. Appellant has had epilepsy since age 20 (she is now 33 years old). This epilepsy has resulted in rather severe permanent damage to the temporal and parietal lobes of the left side of her brain. This portion of the brain is that which largely controls one's emotions. This damage becomes more apparent when appellant is under severe emotional tension or stress. All of which was known to the deceased.

Approximately a year and a half prior to the homicide, deceased was transferred from Macdill Field in Tampa to Homestead Air Force Base south of Miami. Appellant wanted to move, with their son, to Homestead to be with or near her husband. For the first eight or nine months the deceased spent every weekend and all his leave time in Tampa with his wife and son.

In the early part of 1957, the deceased suddenly changed his habits and began cutting his weekend visits short, failing to come home during his leaves, receiving strange telephone calls while at home, coming home with lipstick on his shirt, [fol. 62] washing his clothes immediately upon arrival at home, even at 3 or 4 o'clock in the morning, and doing other acts which were understandably upsetting to appellant. Appellant pleaded with deceased to let her and their son move to Homestead, but to no avail. She drove to Homestead twice during July and August to implore deceased to move her and their son down there, and both times he promised to do so but failed to keep his promise either time, although his conduct continued as before.

The appellant last heard from deceased, prior to the day of the homicide, on September 6th. She attempted repeat-

edly to contact him by telephone without success, and finally sent word on September 18th that their son was dying, which was untrue. Appellant testified she hoped this would bring her husband home. The deceased came home on September 19th, and the appellant did everything in her power during that day to make him happy and to reconcile any differences they might have had. That night she dressed in a sheer nightgown for the obvious purpose of creating a love-making atmosphere in which they could discuss their differences. However, the deceased spurned his wife, seized a pillow and lay down on the couch in the living room, refusing to discuss any problems with her.

Earlier that day a broken baseball bat had been brought by their boy from the yard into the house. Appellant decided to carry the splintered bat to the garbage can. At this juncture because of her husband's sudden, complete and final rejection of her efforts toward revitalizing the marriage, she became emotionally upset, as would forsooth even a *normally stable* wife under such circumstances. The record clearly shows Mrs. Hoyt was far from "normally stable", indeed she was, at least, neurotic if not psychotic.

The oft repeated quotation "Heaven has no rage like love to hatred turned, Nor hell a fury like a woman scorned" has been accepted as apodictic throughout the ages. In her distraught condition appellant struck deceased numerous blows upon his head, inflicting injuries from [fol. 63] which he died the next day. Thereafter appellant had to be kept in the psychiatric ward of Tampa General Hospital for almost two weeks.

Appellant raises several questions. She invokes the jurisdiction of this court, attacking the constitutionality of that portion of Section 40.01 (1), Florida Statutes, which provides that:

> ". . . no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list."

The trial court ruled directly that the statute was constitutional, and appellant is properly before this court.

There is one error assigned which I think without doubt requires the reversal of the judgment of the lower court. Appellant went out on a date with a man about one week

prior to the homocide and did not return to her home until the wee hours of the morning. This man, out of the presence of appellant, called a babysitting agency and ordered a baby sitter sent to appellant's house to stay with appellant's young son. He also, and without appellant's knowledge, gave the agency a false name for appellant. The trial court, over objection of defense counsel, permitted the state to question appellant about this date and to produce the purely hearsay testimony of the ladies of the babysitting agency as to their conversations with the man and with each other as to the false name. This testimony had the sole and devastating effect of, at least, permitting the jury to infer that appellant was a woman of bad character, a prevaricator and equally as guilty as was her husband of infidelity, although her character was never placed in issue. The man was not called to testify. I can only reach the conclusion that this testimony was intended by the county solicitor to prejudice the jury against her, and it may well have had such effect.

Although it is suggested that this cross-examination was [fol. 64] in rebuttal of the defendant's testimony in and by which she depicted her husband as a flagrant philanderer, it does not occur to me that this was proper rebuttal but was noting more nor less than recrimination.

The law in this state upon this subject is in accord with all other jurisdictions. We said in *Mauld* v. *State* (Fla., 1886), 22 Fla. 600, 606, 607:

> "'Proceeding then to consider what has been settled in this matter, I think we may state the law in the following propositions:
>
> "'1. It is not permitted to the prosecution to attack the character of the prisoner, unless he first puts that in issue by offering evidence of his good character.
>
> "'2. It is not permitted to show the defendant's bad character by showing particular acts.
>
> "'3. It is not permitted to show in the prisoner a tendency or disposition to commit the crime with which he is charged.
>
> "'4. It is not permitted to give in evidence other crimes of the prisoner, unless they are so connected

by circumstances with the particular crime in issue as that the proof of one fact with its circumstances has some bearing upon the issue or trial other than such as is expressed in the foregoing three propositions.

• • • • • • •

"'It is quite inconsistent with that fairness of trial to which every man is entitled that the jury should be [fol. 65] prejudiced against him by any evidence except what relates to the issue; above all, should it not be permitted to blacken his character to show that he is worthless, to lighten the sense of responsibility which rests upon the jury, by showing that he is not worthy of painstaking and care.'"

And in *Jordan* v. *State*, (Fla., 1932), 107 Fla. 333, 144 So. 669, 670, we stated:

"It is only permitted to interrogate witnesses as to previous convictions, not more former arrests or accusations, for crime. The defendant as a witness in his own behalf, while subject to legitimate cross-examination, just as is any other witness, does not lose his status or character as a defendant on trial, whose character or reputation it is not permitted to the prosecution to attack, under the guise of a pretended questioning on cross-examination, the principal effect of which is calculated to be an attack on character or reputation of the accused as such, so as to induce a more ready belief that he is guilty of the charge on which he is being tried."

In my judgment the majority opinion has repudiated and receded from the rule of law announced in the above quoted cases, without expressly saying so.

In this case, even though the defendant's character was not in issue, the prosecutor was premitted to question the defendant about her conduct on one occasion. Such ques- [fol. 66] tioning was obviously intended to inflame and prejudice the jury. Further, the conduct of the defendant did not even amount to an offense, let alone a conviction, and was totally unconnected with the offense charged. The prosecutor was also permitted to introduce hearsay testimony, and

hearsay testimony twice removed, which would indicate that appellant had used a false or assumed name for an ulterior purpose wholly unrelated to the offense charge. A conviction based thereon cannot stand.

Appellant further contends that the jury list was improperly made. The facts show that the two jury commissioners for Hillsborough County used a lady clerk, assigned to them by the Clerk of the Circuit Court, to help prepare the list of names of persons to be placed in the jury box. A jury commissioner, as well as the young lady, testified that she selected the names for the jury list from the city directory and other sources and submitted the tentative list of names to the jury commissioners, who divided the list in *half* and each checked only *one-half* the names on the list. The list was then submitted to the circuit judges and thereafter prepared in final form and placed in the box.

Thus, it is seen that the jury commissioners did not *select* the names to go in the box, nor did they each affirm the entire list. Assuming arguendo that confirmation is sufficient, it is quote evident that such affirmation was not of the entire list but only one-half of such list by each commissioner.

The two jury commissioners for Hillsborough County, appointed by the Governor, have a single statutory duty, and that is to personally and in concert, exercise their discretion in selecting the names of persons to be placed in the box for jury duty. This they plainly did not do.

The law on this subject is as we stated in *Chance* v. *State* (Fla., 1934), 115 Fla. 379, 155 So. 663, 664:

> "The county commissioners who are authorized to [fol. 67] make selections of qualified persons for jury duty 'cannot delegate that duty to any other person, but must themselves make the selection, and they cannot by subsequently ratifying a selection made by some other person render the selection valid. Moreover, the selection must be made by the board as a whole, and not as individuals.' 35 C.J. 262."

See also *State ex rel. Jackson* v. *Jordan* (Fla., 1931), 101 Fla. 616, 135 So. 138. This is the general law prevailing in all jurisdictions, and I can find no authority to the contrary, nor has the majority opinion cited any.

I have not overlooked the contention of the State that in the case of *Chance* v. *State*, 115 Fla. 379, 155 So. 663 (Fla., 1934), we were dealing with Section 4444 (2772) Compiled General Laws when we ruled that the county commissioners were required *personally* to select and make out a list of the persons who were to serve as jurors and that said law has been amended by adding thereto the sentence:

> "The Clerk of the Circuit Court shall furnish or cause to be furnished the necessary clerical aid to the commission."

The legislature is presumed to understand, and to know how to express itself by use of, the English language and had that body intended that the "clerical aid", prescribed by the last sentence of Section 40.10, Florida Statutes, should perform the *duties* of the jury commissioners it could, should and would have said so. This the legislature did not do. It simply provided for "necessary clerical aid" but certainly did not grant to such person or persons the power to function in the place and stead of the jury com- [fol. 68] missioners. Moreover, as aforestated, the jury commissioners did not personally and individually examine or *ratify* the *full* list of jurors prepared by their "clerical aid" but each inspected only one-half of such list. It is crystal clear that the jury commissioners did not personally prepare the jury list. It may be true that the young lady—the clerical assistant—was present and took part "in the solemn duty of selecting names for jury lists" but it is even more certain that she, rather than the jury commissioners, actually prepared the jury list.

It is my opinion that our decision in the case of *Chance* v. *State*, supra, is applicable to Section 40.10 Florida Statutes and controlling herein.

For the reasons above stated, I respectfully dissent from the majority opinion.

Thomas, C. J., concurs.

[fol. 69] IN THE SUPREME COURT OF FLORIDA, JULY TERM A.D. 1959

GWENDOLYN HOYT, Appellant,

vs.

THE STATE OF FLORIDA, Appellee

JUDGMENT — December 2, 1961

This cause having heretofore been submitted to the Court upon the transcript of the record of the judgment herein, and briefs and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be and the same is hereby affirmed; it is further ordered by the Court that the Appellee do have and recover of and from the Appellant costs in this behalf expended, herein taxed except the $25.00 filing fee which has been paid by the Appellant, and that all costs shall be taxed in the court in which the appeal was entered, all of which is ordered to be certified to the Court below.

The Opinion of the Court in this cause prepared by Mr. Justice Drew was this day ordered to be filed.

[fol. 70] Corrected Copy

IN THE SUPREME COURT OF FLORIDA JANUARY TERM, A.D. 1960

Case No. 29,966

GWENDOLYN HOYT, Appellant,

vs.

STATE OF FLORIDA, Appellee

ORDER DENYING PETITION FOR REHEARING—April 20, 1960

Per Curiam:

On consideration of the Petition for Rehearing filed by Attorneys for Appellant,

It is ordered by the Court that the said petition be, and the same is hereby, denied.

Terrell, Roberts, Drew, Thornal and O'Connell, JJ., concur.

Thomas, C. J., dissents.

Hobson, J., dissents with opinion.

[fol. 71] DISSENTING OPINION ON PETITION FOR REHEARING —Filed April 20, 1960

Hobson, J., dissenting:

Upon a reconsideration of this case on petition for rehearing, I have concluded that the portion of Section 40.01 (1), Florida Statutes, which limits female jury duty to volunteers is unconstitutional. It places an undue burden upon women who otherwise are qualified for jury service which is not demanded of others so situated.

The question how can Gwendolyn Hoyt (appellant herein) complain, naturally arises. The answer is simple. She was accused of having committed a felony and, as will be demonstrated hereinafter, she had only a *slight* chance of [fol. 72] securing even one of her own sex to sit in judgment upon her. She was not confronted by a jury of her peers — no member of the jury was in the feminine category.

No one in this enlightened age would question the fact that if a limitation such as is placed upon women by our statute with reference to jury service were engrafted into

our statutory law in regard to some of the so-called minority groups comprising our citizenry, it would be stricken down as violative of constitutional guarantees of due process and equal protection of the law.

It might be said that if *all* persons eligible to sit as jurors would be called to perform such duty only upon volunteering, that such an act would be constitutional. However, the situation thus developed would be gauche, as well as impracticable. As a presiding judge of one of the highest nisi prius courts in this state for more than twenty years, I learned that those who seek to be excused from jury service are, generally speaking, the best qualified to perform such duty. If volunteering were a prerequisite for jury duty we would have only those persons who might be described as professional jurors—individuals who might be interested in the outcome of a given case or who, with nothing else to do, would have their attention directed toward the few dollars which are provided by law for such service.

Trial by a jury of one's peers may not be the best method of deciding questions of personal liberty or of property rights which could be envisaged, but until the minds of a free people develop a better system it must be held inviolate and protected at every turn. No valid reason exists for limiting jury service to women who volunteer. Trial judges have the same broad discretion to excuse women with pressing duties at home as to excuse men with pressing business commitments. Moreover, since the advent of woman suffrage and the entry, in this era of modernity, of untold numbers of American women into all fields of business and professional life, the reason given[1] for excluding them [fol. 73] from jury service no longer exists, nor does that or any other reasonable basis which I can envisage exist to justify the provision of our statute limiting female jury duty to volunteers.

It would appear, from the opinion of the majority, that jury trial is a privilege which may be limited or discarded by the legislature. Such is not the case where criminal trials are involved. The founders of this nation were so disturbed by abuses of the sovereign in this respect that

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[1] Women are primarily homemakers and should not be diverted from their duties as such.

the right to trial by jury was *guaranteed* to all defendants in criminal cases (6th Amendment, U. S. Constitution), and our own Constitution adopted this guarantee as a part of our declaration of Rights (Section 11, Florida Constitution).

Here, under the statute, the names of only ten women were included among the 10,000 names placed in the jury box in 1956, and none were among the 2500 names added to the box in 1957 because *none were drawn out* during the entire year 1956. Thus, while .40 or 40% of the qualified jurors in the county were women, only .001 or one-tenth *of 1% of the names placed in the jury box were women.*

There can be no question that women as a class have been discriminated against by the statutory limitation.

The majority suggests that, while administrative discrimination is unconstitutional, legislative discrimination is not, and quotes a passage from *Hernandez* v. *Texas*, (1953), 347 U. S. 475, 74 S. Ct. 667, 98 L. Ed. 866, purporting to support this view. In fact, *Hernandez* v. *Texas*, supra, constitutes the most recent authority for the opposite conclusion. There the U. S. Supreme Court held, in a case involving discrimination against persons of Mexican descent for jury service, that when any distinct class in the community is singled out by the State, for different treatment not based upon some reasonable classification, "whether acting through its legislature, its courts, or its executive or administrative officers" then "the guarantees of the Constitution have been violated."

Again, the majority opinion states that since "some" women might be called for jury service under the statutory [fol. 74] system, there is no unconstitutional exclusion of "all" women. In *Thiel* v. *Southern Pacific Company*, (1945) 328 U.S. 217, 66 S. Ct. 984, 90 L.Ed. 1181, 166 A.L.R. 1412, the U. S. Supreme Court held that the exclusion of a distinct and substantial class in the community (in that case daily wage-earners) "either in whole or in part" could not be tolerated.[2] Indeed, in *Hernandez* v. *Texas*, supra, Mexicans were not entirely excluded from jury service.

In our statute under attack the legislature has qualified

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[2] Here court discussed discretion of the trial judge to excuse in individual cases.

women as fully as men for jury service and then restricted their eligibility to serve to only those women who volunteer, a restriction not placed upon men. There is no reasonable basis for this classification of a class (non-volunteers) within a class (women).

Of the cases cited in the majority opinion, all support this view except *Fay* v. *New York*, (1946), 332 U.S. 261, 91 L. Ed. 2043. There, no discrimination against women was found under the facts, and actually, some women were called in that case for jury duty, and one served on the jury. Here, the discrimination is patent on the face of the statute.

I approve and would follow the decision in *Ballard* v. *U.S.*, (1946), 329 U.S. 187, 67 S. Ct. 291, 91 L. Ed. 181.[3]

Concluding this point, it seems to me that if the present restriction upon female jury service were constitutional, then we must hold that the legislature could validly require all women to serve but limit male service to volunteers and thus, in effect, create an all female jury system. At least this presents the test of the present restriction.

I would find that portion of Chapter 40.01 (1), Florida Statutes, which reads as follows:

> "provided, however, that the name of no female person shall be taken for jury service unless said person [fol. 75] has registered with the clerk of the circuit court her desire to be placed on the jury list."

unconstitutional and in conflict with the "impartial jury trial" guarantees of both the Florida and Federal Constitutions and the "equal protection of the law" provision of the Federal Constitution.

For the reasons above stated, I would grant the petition for rehearing.

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[3] See 31 Am. Jur. 617 and 166 A.L.R. 1422.

[fol. 76] [File endorsement omitted]

IN THE SUPREME COURT OF FLORIDA

Case No. 29,966

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 20, 1960

I. Notice is hereby given that Gwendolyn Hoyt, the appellant above named, hereby appeals to the Supreme Court of the United States from the Final Order and Judgment of the Supreme Court of Florida affirming the Judgment of Conviction of the Appellant Gwendolyn Hoyt for the crime of Second Degree Murder by the Criminal Court of Record of Hillsborough County, Florida, and from the Order and Judgment of the Supreme Court of Florida denying appellant's Petition for Rehearing of such Final Order entered herein on April 20, 1960.

This appeal is taken pursuant to 28 USC § 1257 (2).

Appellant was convicted of the crime of Murder in the Second Degree under § 782.04, Florida Statutes; was sentenced to serve thirty (30) years confinement at hard labor; is presently *enlarged* on bail in the sum of $3,500.00.

II. The Clerk will please prepare a Transcript of Record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said Transcript the following:

[fol. 77] (1) Information filed October 2, 1957 (TR 13);

(2) Jury Venire served by sheriff for November 4 through November 15, 1957 (TR 4-5);

(3) Challenge to Jury Panel filed November 8, 1957 (TR 6-10);

(4) List of jurors drawn by the Court November 15, 1957 (TR 11-12);

(5) Amended Challenge to Jury Panel filed December 2, 1957 (TR 14-18);

(6) Transcript of Hearing on Defendant's Amended Challenge to Jury Panel, held December 15, 1957, including testimony of witnesses James H. Lockhart, Katherine L. McPhillips, John C. Dekle, Order of Judge L. A. Grayson, Statement of witness Katherine L. McPhillips and certificates of Official Court Reporter (TR 20-48, inclusive);

(7) Transcript of trial other than that designated in Paragraph 6 above.

(8) Order Denying Amended Challenge to Jury Panel, December 5, 1957 (TR 49);

(9) Additional Challenge to Jury Panel filed December 12, 1957 (TR 50-52);

(10) Order Denying Additional Challenge to Jury Panel, filed December 17, 1957 (TR 53);

[fol. 78] (11) Waiver of Arraignment and Plea, December 17, 1957 (TR 54);

(12) Verdict of the Jury, December 19, 1957 (TR 600);

(13) Motion for New Trial, filed January 2, 1958 (TR 601-6);

(14) Amendment to Motion for New Trial, filed January 3, 1958 (TR 607-612);

(15) Order Denying Motion for New Trial and Amendment to Motion for New Trial, filed January 11, 1958 (TR 629);

(16) Judgment, Order and Sentence of Trial Court, January 20, 1958 (TR 630);

(17) Affidavit of Insolvency of Defendant, filed January 20, 1958 (TR 631-632);

(18) Order of Insolvency, January 20, 1958 (TR 633);

(19) Notice of Appeal to Supreme Court of Florida (TR 634-635);

(20) Assignments of Error and Grounds of Appeal in Supreme Court of Florida (TR 638-642);

(21) Opinions and Judgment of Supreme Court of Florida, filed December 2, 1959;

(22) Opinions and Judgment of Supreme Court of Florida on Petition for Rehearing, filed April 20, 1960;

(23) This Notice of Appeal to the Supreme Court of the United States, together with proof of service thereof;

[fol. 79] (24) Mandate of the Supreme Court of Florida to the Criminal Court of Record of Hillsborough County, Florida;

(25) Petition for Order of Supersedeas pending Appeal to United States Supreme Court;

(26) Order of Supersedeas pending Appeal to United States Supreme Court.

III. The following questions are presented by this Appeal:

1. Whether that portion of Section 40.01 (1) of the Florida Statutes which requires female persons to volunteer for jury service with the Clerk of Circuit Court is repugnant to and in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States?

The Supreme Court of Florida decided in favor of the validity of such Statute.

(Florida Statutes § 40.01 (1) reads as follows:

"Qualifications and Disqualifications of Jurors

(1) Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one years, who are citizens of this state, and who have resided in the state for one year and in their respective counties for six months, and who are duly qualified [fol. 80] electors of their respective counties; provided, however, that *the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list.*" (Emphasis ours).)

2. Whether said Florida Statutes § 40.01 (1) because of its effect in practice of excluding women from the jury which tried the defendant, a woman accused of a crime under the circumstances and raising issues in which the point of view of women was most important, is, as applied to the defendant, repugnant to and a violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, the established facts showing that although forty per cent of the entire electorate were females, numbering 46,000 women, only 218 female electors were registered with the clerk of the circuit court?

3. Whether said Florida Statutes § 40.01 (1) as applied by the jury commissioners of Hillsborough County, Florida

against the defendant in arbitrarily and systematically exluding all women from the 2500 names placed in the jury box in 1957 and in arbitrarily and deliberately restricting the number of women to ten on the list of 10,000 person placed in the jury box in 1956, from which the jury was drawn which tried the defendant for the murder of her husband, is repugnant to and in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States?

[fol. 81] The Supreme Court of Florida decided in favor of the validity of such action of the jury commissioners.

Herbert B. Ehrmann, Esq., of Goulston & Storrs, 50 Federal Street, Boston 10, Massachusetts. Carl C. Durrance, Esq., 308 Tampa Street, Tampa 2, Florida, and C. J. Hardee, Jr., Esq., of Hardee & Ott, 308 Tampa Street, Tampa 2, Florida, By: C. J. Hardee, Jr., Attorneys for Appellant.

[fol. 82-83] Proof of Service (omitted in printing)

[fol. 84] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 85] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1960

No. 126 Misc.

[Title omitted]

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—January 9, 1961

On consideration of the motion for leave to proceed herein *in forma pauperis*,

It is ordered by this Court that the said motion be, and the same is hereby, granted.

[fol. 86] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1960

No. 126 Misc.

GWENDOLYN HOYT, Appellant,

vs.

FLORIDA

Appeal from the Supreme Court of the State of Florida.

ORDER NOTING PROBABLE JURISDICTION—January 9, 1961

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the appellate docket as No. 639 and placed on the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE 1961 [illegible]

IN THE

Supreme Court of the United States

October Term, 1961

No. 31

GWENDOLYN HOYT,
Appellant,

v.

THE STATE OF FLORIDA,
Appellee.

BRIEF OF THE FLORIDA CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION, *AMICI CURIAE*

DOROTHY KENYON,
c/o American Civil Liberties Union,
156 Fifth Avenue,
New York 10, N. Y.

PHYLLIS J. SHAMPANIER,
c/o Florida Civil Liberties Union,
509 Olympia Building,
Miami 32, Florida.

Attorneys for Amici.

ROWLAND WATTS,
of Counsel.

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IN THE

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STATE OF FLORIDA,

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BRIEF OF THE FLORIDA CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION, *AMICI CURIAE*

The American Civil Liberties Union and the Florida Civil Liberties Union, appear herein as *Amici Curiae* upon consent of the parties hereto, filed with the Clerk of the Court.

Interest of *Amici*

The American Civil Liberties Union is a nationwide non-profit, non-partisan membership organization devoted exclusively to the defense, the fostering, and the promotion of the rights guaranteed by the Constitution of the United States and of the various states. The Florida Civil Liberties Union is a state affiliate of the American Civil Liberties Union.

Amici appear herein because they believe that there has been a fundamental denial of appellant's rights under the Constitution of the United States in that she was denied her equal right to a fair trial because of discrimination against women in the establishment of jury panels in

Florida. This case is of vital importance to the appellant. In addition, it is of nationwide importance because similar discrimination exists in 22 states and the District of Columbia.

Statement of Facts of the Case

The facts of this case are given in detail elsewhere in the briefs and record on appeal. Suffice it to say that the defendant is a young woman convicted of the murder in hot blood of her admittedly faithless husband on the night he told her he was leaving her forever. The weapon used was not the handy kitchen knife usual in such killings of erring husbands [1] but a broken baseball bat belonging to her small son and equally ready to her hand. This is the classic form of marital tragedy, known from antiquity.

The defendant was tried before a jury, also a classic institution in English-speaking countries, a jury, as the saying goes, "of her peers." The jury were all men, the time 1957.

The Issue

The defendant claims that, because of the effectual exclusion (both by statute and administrative act) of women from the jury, the jury therefore was not a true cross-section of her peers and she was in consequence deprived of the equal protection of the laws guaranteed to her by the Fourteenth Amendment to the Constitution. Her defense rests on three separate points, each relevant to the central issue and each fully set forth in the principal brief. They will consequently be discussed here only briefly. This brief will be largely limited to the basic constitutional question as to what equal protection of the laws means or should mean to women in such a case in this present day and age.

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[1] Henrietta Additon, former Superintendent of the Women's State Prison, Bedford, New York, states that a great many women murderesses kill their husbands in hot blood with a kitchen knife.

THE THREE MAIN QUESTIONS

I

Whether that portion of Section 40.01(1), Florida Statutes, which excludes from jury service all female persons who do not volunteer to serve is repugnant to and in violation of appellant's rights under the Fourteenth Amendment to the Constitution of the United States?

The Florida Statute recites that "jurors shall be taken from * * * male and female persons" having certain identical qualifications, namely that they must be over 21 years of age, citizens of the State, and so forth. Then it goes on to say "provided, however, that the name of no female person shall be taken for jury service unless said person has registered * * * her desire to be placed on the jury list." Thus only women who have volunteered to serve, and in a particular manner in advance, can be called.

This is a differentiation as between men and women, a separate classification of the two groups, which, it is submitted, if challenged, can only be justified if the basis for such classification be reasonable. The challenge could come from either one of two sources, for there would appear to be at least two distinct rights involved: (1) the right and corollary obligation of fully enfranchised women, citizens in the exact sense of the word, to participate in this important public duty without special restrictions not imposed upon men, and (2) the right of all persons accused of crime to be tried before a jury which is a true cross-section of their peers.

The question of the reasonableness of this classification as between men and women jurors—the one compelled to serve, the other merely volunteering—therefore becomes

important. The reason generally given for the classification, and its supposed justification, is the hardship which might be imposed upon the mothers of small children if jury service were compulsory for them, or, as phrased by Judge Hobson (in his second dissenting opinion in this case, on the Petition for Rehearing, Supreme Court of Florida, January Term, filed April 20th, 1960), the fact "that women are primarily homemakers and should not be diverted from their duties as such."

If this classification be found unreasonable, then, it is submitted, the statute must fall as an unreasonable discrimination against both the potential woman juror and the woman defendant seeking a jury of her peers.

II

Whether said Section 40.01 (1) Florida Statutes, because of its effect in largely and systematically excluding women from the jury which tried the appellant, a woman accused of a crime under the circumstances and raising issues in which the point of view of women was most important, is, as applied to the appellant, repugnant to and a violation of the Fourteenth Amendment to the Constitution of the United States?

The figures, briefly stated, show that while the registered voters of the county in which defendant was tried in 1957 were 114,247 in number, of which 40% (46,000) were women, only 218 women were registered, 30 to 35 of them having done so in the last five years. Of this number, only 10 were picked for jury rolls in 1957, as compared with 9,990 men. This means that of the total chosen as available for jury service, only one-tenth of one percent were women. Even had all women who registered been included the figure would only have been a little over 2%. The great reservoir of registered women voters in the county was going virtually untapped.

This is in line with general experience. Whatever the causes, it appears to be a well established fact that, under a volunteer set-up, even without the necessity of advance registration as here, few women ever volunteer to serve.[2] Many women remain ignorant of the right and fail to exercise it on that account. Others find the nuisance of registration irksome. It also gives a splendid opportunity for some women who could easily serve to evade what to most people, men and women alike, is at best a disagreeable duty. Those women who do volunteer are mainly the dedicated women (or their descendants) who battled long and faithfully during the last century and this for the full emancipation of women and who finally won the vote forty-one years ago. Or else they are the least desirable among the members of the general public, those whom Judge Hobson (in his second dissenting opinion in the case referred to, *supra*) described as, "professional jurors—individuals who might be interested in the outcome of a given case or who, with nothing else to do, would have their attention directed toward the few dollars which are provided by law for such service."

Aside from the language of the statute itself, therefore, the administration of the Florida statute in recent years amply demonstrates that its effect is to keep women off the jury rolls for all practical purposes and thus to deprive defendant, a woman herself and accused of a crime peculiarly within the experience and understanding of women, of the opportunity to have women serve on her jury.

If this be the inevitable effect of a law based upon such a classification, the reasonableness of such classification becomes again the major issue.

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[2] Women Jurors, Julia Margaret Hicks, National League of Women Voters, p. 16 (1928). This indicates that the experience of Florida is typical.

III

Whether said Section 40.01(1), Florida Statutes, as applied by the jury commissioners, or whether the action of the commissioners, in arbitrarily limiting over a period of years the number of women placed on the jury list from which appellant's jury was drawn, is repugnant to and in violation of the Fourteenth Amendment to the Constitution of the United States?

In administering the Florida statute the Commissioners and their staff went beyond the limits of the statute and for no observable good reason took it upon themselves to circumscribe the potential of available women jurors even further than the law required. As stated above, it was their practice not to put down all the names of women who had registered, insignificant though that number was in relation to the total number of available men. In 1957 they did not even bother to look at the women's registry book and did not put down a single one of the new names. Discovering that there were 10 women's names still left undrawn from the previous year's list, they simply left them there; and those were the women, and the only women, available to be drawn upon for service on defendant's jury. The same number had appeared on the lists for several years previously.

Thus the act of the Commissioners and their staff was deliberate and intended to cut down the proportionate representation of women even lower than the insignificant number who had actually volunteered, the number being cut down almost to the vanishing point. It would appear to be a planned, systematic and arbitrary exclusion of women for all practical purposes from the lists.

It has long been the law that the express exclusion of Negroes from juries or jury lists, on the sole ground of race or color—whether by statute or administrative act—

was an unreasonable classification and therefore a denial to Negro defendants of the equal protection of the laws.[3] Is the same thing true in the case of women? Or is the rationale back of their classification in a category different from men, on the sole ground of sex, reasonable?

In a dictum written over eighty years ago, when only a few women had the right to vote and none had the right to serve on juries, the Supreme Court answered the second question in the affirmative.[4] Is it still a reasonable classification today? That is the question.

THE LAW OF THE CASE

The Right to Trial by Jury

Trial by jury is an ancient right; deriving, as every school child knows, from Magna Carta. In that document King John promised his people that henceforth they would be tried only by their peers.

This right is incorporated in the Constitution of the United States.[5] It is described there as the right "to an impartial jury." It appears in substantially the same form in most State Constitutions, including the Constitution of Florida.[6]

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[3] *Strauder* v. *West Virginia*, 100 U. S. 303, 1879; see also *Neal* v. *Delaware*, 103 U. S. 370.

[4] *Strauder* v. *West Virginia*, *supra*:

> "We do not say that within the limits from which it is not excluded by the amendment, a state may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the situation to *males*, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color." (Emphasis supplied.)

[5] Amendments V and VI.

[6] Section 11, Declaration of Rights; Florida Constitution.

As Blackstone phrased it several centuries after Magna Carta, "The right of trial by j.. or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter."[7]

In *Strauder* v. *West Virginia, supra,* the Court described a jury thus:

> "The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."

A jury has also been characterized repeatedly as "A cross-section of the community."[8]

For many years juries were limited to free men. No slaves or women were included. As Blackstone said, a common-law jury consisted of twelve "free and lawful men." Women were excluded "propter defectum sexus" (because of the defect of sex).[9] But changes were to come in both categories.

Negroes Achieved the Right of Trial by Jury by way of the Fourteenth Amendment

When the slaves were freed, the males among them automatically became citizens (in legal theory at least) with all the legal rights and responsibilities of citizenship, the right to vote and to hold public office and the right and obligation to serve on juries.[10]

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[7] Black, Com., as quoted in *Strauder* v. *West Virginia, supra.*

[8] *Glasser* v. *U. S.*, 315 U. S. 60 (1942).

[9] 3 Black. Com. 361.

[10] See *Strauder* v. *West Virginia* and *Neal* v. *Delaware, supra.*

The right of jury trial was not achieved however without a struggle. In *Strauder* v. *West Virginia, supra,* the Federal court permitted removal of a case involving a Negro, convicted of murder in a State court which excluded Negroes from the jury, to the Federal court, saying that the equality clause of the Fourteenth Amendment assured him protection from discrimination of that nature:

> "How can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?"

The court went further and indicated that in its judgement the Amendment was not limited to Negroes, saying:

> "Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the Amendment?"

In *Smith* v. *Texas,* 311 U. S. 128 (1940), a Negro had been indicted for rape by a Grand Jury of white men only. The law did not exclude Negroes and a few were occasionally chosen for service but, by various ingenious devices, none of them ever served. The Court (by Mr. Justice Black) said, "If there has been discrimination, whether accomplished ingeniously or not, the conviction cannot stand."

In *Cassell* v. *Texas,* 339 U. S. 282 (1949), a Negro indicted for murder claimed that Negroes had been intentionally excluded from Grand Jury panels, although a few had occasionally served but not in nearly the same proportion to the population as whites. It was also brought out in explanation of their exclusion that the Commissioners did not know any Negroes personally. The Court, while

remarking that "proportional representation of races on a jury is not a constitutional requisite," nevertheless ruled that intentional exclusion, although not absolute, had been proven and was sufficiently extensive to be in violation of the Fourteenth Amendment.

Other Groupings or Classes, Economic as well as Racial, have Achieved the same Right

A recent case [11] is significant because it has gone further in its application of the doctrine than any other so far. The case involved not race at all but economic status. While it was a Federal case from the outset and did not originate in any State, it nevertheless dealt with exactly the same kind of arbitrary exclusion that we are discussing here. The plaintiff, claiming injury caused by the negligence of a train crew which had known of his mentally unbalanced condition, protested that all daily wage earners had been "deliberately and intentionally excluded from the jury lists." The court found this to be the fact, saying that,

> "Business men and their wives constitute at least 50% of the jury lists • • • The exclusion of all those who earn a daily wage cannot be justified."

The court commented that what was needed was "an impartial jury, drawn from a cross-section of the community." While they cannot be "representatives of all the economic, social, religious, racial, political, and geographic groups of the community; frequently such complete representation would be impossible," nevertheless, "Prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups."

It concluded by saying that, "Jury service is a duty as well as a privilege of citizenship; it is a duty that cannot be shirked."

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[11] *Thiel* v. *Southern Pacific*, 328 U. S. 217 (1946).

Mr. Justice Frankfurter (dissenting from the finding of exclusion), added his comment on the jury system thus:

> "The broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility."

A later case, *Hernandez* v. *Texas*, 347 U. S. 475 (1954), involving a Mexican, a man of different race but not a Negro, is significant for the summary made by the Chief Justice of the nature of such cases generally. Hernandez had been tried for murder before a State jury from which all Mexicans had been deliberately excluded by administrative act. Chief Justice Warren delivered the opinion:

> "It is a denial of the equal protection of the laws," he said, "to try a defendant of a particular race or color under an indictment issued by a Grand Jury, or before a petit jury, from which all persons of his race or color have, solely because of that race or color, been excluded by the State, whether acting through its legislature, its courts, or its executive or administrative officers.
>
> "His only claim is the right to be indicted and tried by juries from which all members of his class are not systematically excluded—juries selected from among all qualified persons regardless of national origin or descent."

He then summed up the general rule in language going far beyond the limited realms of race or color, as follows:

> "*When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated.*" (Emphasis supplied.)

What of the Rights of Women under the Amendment?

It is a violation of the equal protection guaranteed by the Fourteenth Amendment for a Negro to be tried before a jury from which members of his race or color are systematically excluded, in whole or in substantial part. It is equally a violation for members of other races or color, and even for members of sharply differing economic categories.

What then of women who, if they are excluded, as Mr. Justice Douglas said in *Ballard* v. *United States*, 329 U. S. 187 (1946), would leave "only half of the available population" to be "drawn upon for jury service?" What is the reason compelling enough to justify their absence from this important "phase of civic responsibility" and "diffused impartiality?"[12] How can we have a true cross section of the community to draw upon without women? Where is that equality of protection guaranteed by our Constitution if a woman defendant accused of a dreadful sex murder must be judged only by men?

These questions have been answered, as we have seen, and almost always against women, in the past. But the past is past and we are dealing with the present. As was said in *Brown* v. *Board of Education*, 347 U. S. 483, "We cannot turn the clock back to 1868 when the Amendment was adopted * * *. We must consider public education in the light of its full development and its present place in American life throughout the nation."

The same reasoning surely applies to women who too have had to fight a slow and painful battle during the last century and a half for recognition and status not very different from that of the Negro slaves.

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[12] Justice Frankfurter in *Thiel* v. *Southern Pacific*, *supra*.

History of Women Jury Laws

It may help us to understand the problem better if we briefly review the history of the jury laws relating to women. Women are newcomers in this field, the first woman juror having served in Washington State in 1911. It is easy to understand why they were not thought of for such service in King John's day. Women who were married, as most adult women were, had no legal status in those days. Their legal existence was deemed "suspended" during marriage, which meant swallowed up in that of their husbands. No wonder that, when people talked of juries of one's peers, they referred to men and not women. The defect of sex was for women an almost total blackout.

But that was long ago. Women have gone through a revolution since those days. Nevertheless when Negro men slaves won their freedom in the United States they automatically gained all the rights that went with citizenship,[13] whereas, when women won the vote after fifty years of struggle, the vote was all they got. The Nineteenth Amendment covered only that one point. They were still not full citizens as Negro men were. The defect of sex still hung heavy upon them and they had to fight separately for all the other rights that go with citizenship. Further state legislation was required to give them the right to hold public office; further state legislation was required to give them the right and the duty to serve on juries. Even now, forty-one years after they finally won the full right to vote, the right of jury service is still withheld from women altogether in three States and it is granted on a voluntary basis only in nineteen others and the District of Columbia. Only twenty-eight states grant jury service to them on

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[13] *Strauder* v. *West Virginia*, *Neal* v. *Delaware*, *supra*.

the same terms as men, of which seven permit women with family responsibilities to be excused.[14]

The dictum of *Strauder* v. *West Virginia*, *supra*,[15] has been responsible for all this confusion and delay. For, as

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[14] Memorandum of U. S. Department of Labor, Women's Bureau, Washington 25, dated August 7, 1961.

"*Summary of Jury Service Provisions for Women in State laws*

"State laws governing women's eligibility for service on State juries remained static in the last two years with the exception of Maryland, where the two remaining counties removed the bar to women's eligibility. Alabama, Mississippi, and South Carolina still do not permit women to serve on State juries although they can and do serve on Federal juries in those States by virtue of the Civil Rights Act of 1957.

"Twenty-eight [1] States provide that women are subject to jury service on the same terms and conditions as men. Of these so-called 'compulsory' laws, 7 [2] permit women to be excused if they have family responsibility which would make jury service an undue hardship. Sixteen [3] States and the District of Columbia permit a woman to claim an exemption solely on the basis of her sex. Florida, Louisiana, and New Hampshire require a woman to indicate her desire to service before she is eligible. The constitutionality of the Florida provision is being tested in the United States Supreme Court where hearings have been scheduled for the October term."

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[1] Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Montana, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Vermont, West Virginia, Wyoming.

[2] Connecticut, Nebraska, North Carolina, Oklahoma, Texas, Utah, Wyoming

[3] Alaska, Arkansas, Georgia, Idaho, Kansas, Massachusetts, Minnesota, Missouri, Nevada, New York, North Dakota, Rhode Island, Tennessee, Virginia, Washington, Wisconsin."

[15] Namely, that the question of jury qualifications for women was a matter for the States and that the Fourteenth Amendment was never intended to prohibit it.

a result of that dictum, the determination of the sex qualifications of jurors has been left entirely to the States. The federal government has been concerned only with juries in the federal courts and their rules followed those of the States in which each federal court was located. Each state has had its own jury statute dating back to Revolutionary days and there has been wide diversity in the qualifications and the language used to describe them. Many states used the term "male" or the masculine pronoun in describing jurors; others used the words "electors", "voters", "freeholders", and the like. As each state granted women the franchise or other civil rights (many of them prior to 1920), there ensued an enormous amount of litigation as to the meaning and effect of these new statutes upon the old and as to how the old should be interpreted or modified by them if at all.

If the word "voter" or "elector," for instance, had been used in describing jurors in the old law, the question had to be decided whether the fact that women had become voters automatically made them jurors now. In Massachusetts the answer was, "No."[16] In several other states the answer was, "Yes".[17] It is interesting to note that in some of these latter cases there was favorable reference to the doctrine enunciated in *Neal* v. *Delaware, supra* (the case involving Negroes), as being analogous to the case of women, and some criticism of the opposing decisions of other states thereon.

If the word "male" had been used in the old jury statutes, however, women invariably lost out. In *In Re Grilli*, 179 N. Y. S. 795, for instance, a case typical of this line of cases, it was said that the use of the word "male"

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[16] *Re Opinion of the Justices*, 237 Mass. 591.

[17] *Commonwealth* v. *Maxwell*, 271 Pa. 378; *Parus* v. *District Court*, 42 Nevada 229; *People* v. *Baritz*, 212 Mich. 580, among others.

automatically excluded women as long as the word stood on the statute books. New legislation would have to be enacted in order to give women the right to serve.

Thus women have had to fight in every state to expand their rights in these areas and they are still fighting.

Few of these cases have reached this Court. The few that have were mostly brought by men complaining of discrimination under the Fourteenth Amendment, not because of the *absence* of women from juries but because of their *presence* on them. Several of them concerned violations of liquor laws where the trepidation of men at having women on their juries in prohibition days was perhaps understandable. Such cases were dismissed as without merit.[18]

One case which came before the Supreme Court in 1947 has been cited as supporting the dictum in *Strauder* v. *West Virginia, supra.* This case, *Fay* v. *New York*, 332 U. S. 261, however, on its facts would appear to do nothing of the sort. Plaintiff was a man, not a woman; a woman actually served on the jury before which he appeared; and the case was decided on the ground, among others, that there was no evidence of any systematic exclusion either of women, laborers, mechanics, or any other of the groups complained of as missing. Of this, so far as women were concerned, there could be no doubt. Of the 60,000 on the panel, 7,000 (or 11%) were women. Three women had been drawn as talesmen and one actually served on the jury in question. This could hardly be described as exclusion, systematic or otherwise. But it was not the central point of the case. The real point at issue was the special Blue Ribbon type of jury before which plaintiff appeared. Composed, by a special screening process of the better educated members of the community, plaintiff

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[18] See *Tynan* v. *U. S.*, 297 F. 177; Cert. Denied, 266 U. S. 604 (1924).

complained of it as more prone to convict than a regular jury. The due process and equality clauses of the Fourteenth Amendment were both discussed and declared inapplicable on the facts. The case would appear to be in no way parallel to the case at bar.

As for the old dictum of the *Strauder* case, *supra*, it would seem that this, written in the aftermath of the Civil War and while the immediate occasion of the Fourteenth Amendment (namely, the freeing of the slaves) was still fresh in all men's minds, should be deemed to have been superseded by the later decisions giving wider scope to the Amendment and particularly by the summary in Chief Justice Warren's opinion in 1954 in the *Hernandez* case, *supra*, as to the criteria applicable to the equality clause of the Fourteenth Amendment.

In respect to jury service, the Fourteenth Amendment would now appear to extend equal protection to all demonstrably distinct classes of society. The Amendment was never by its language limited to Negroes only, or even only to race or color. Whenever a demonstrably distinct class of society is classified in a way different from other classes, the classification must be reasonable. If not, inequality results and the classification must fall.

Since women are a demonstrably distinct class in the community, this rule would appear to be equally applicable to them. In order to determine the reasonableness of their differential treatment in this field, let us take a look at the various qualifications imposed by the states on jurors generally and their reasons for being.

The Qualifications of Jurors, Differential and Otherwise

Within the constitutional limits imposed upon them, the states have set up a great variety of different qualifications for jury service. Some are the same for everybody, such as age, citizenship, literacy, etc. Others make differentiations as between different groupings of people.

While varying in details, most of the differentiations follow a general pattern of public policy, convenience, and good sense. All citizens are compelled to serve except for the various exceptions arising out of these differentiations. The exceptions under New York Law, which are numerous, are typical.

New York has various categories.[19] Some groups are wholly disqualified, government officials, legislators, judges and the like, who by the very nature of their tasks should not be called upon to serve. Convicted felons are another wholly disqualified group which it also seems reasonable to exclude. Another group consists of jurors with scruples against the death penalty "which would prevent him from finding a verdict of guilty of any crime punishable by death." The reason for this is perhaps more questionable but it has found wide acceptance among the States.[20]

Other groups have the right to claim exemption if they wish to. These are doctors, clergymen, teachers, lawyers, firemen or policemen, newspapermen and the like. All of these groups, while representing important segments of community life, are nevertheless engaged in occupations which in the public interest should not be too much interfered with, hence their right not to serve.

The third and final category might be called the temporary or emergency hardship cases. The prospective juror in this case if called must ask the judge to be excused

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[19] Judiciary Law of New York—Secs. 504-505-506-507.

[20] This category (common to most States) has come under heavy criticism lately on the ground that it tends to exclude more and more of the perceptive and thoughtful people in the community and that the question of the nature of the punishment is quite different from the question of guilt. See *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, by Walter E. Oberer, May, 1961, Texas Law Review.

on the ground of hardship of one sort or another. The judge is given wide discretionary power to excuse for a great variety of reasons.

All of this, except perhaps for the disqualification of those with scruples against the death penalty, seems fair and reasonable. After all, jury service while compulsory was never intended to impose undue hardship on anybody nor to take people important to the community in other capacities (such as doctors and teachers) away from their regular responsibilities. The pool of persons available in the general community is sufficiently large not to require any such sacrifice. So, on balance, in most of these cases, the reason for separate classification and exemption in respect to jury duty seems a good one.

New York, however (like eighteen other States, including Florida), includes another grouping in its exempt category—women. There is no limitation upon the generality of this exemption. All women are free to claim their exemption qua women. In other words jury service with them is not compulsory, it is wholly voluntary. In Florida they must register as well.

What are the reasons for this?

Reasons for the Differential Classification of Women

Part of the reason for it of course is historical, a survival of the thinking of older times, when women were no part of the body politic. Old habits change slowly; customs survive far beyond the reason for their being; the herd instinct is strong. Particularly has this been true in the case of women whose advance, predicated on logic, has been retarded principally by emotion.

"Woman's place is in the home," a slogan of ancient origin, has living force and terrific emotional impact even today. It has taken people a long time to realize (and some

still do not) that the great revolutionary forces that helped to bring about the advancement and emancipation of women in the last century have changed the patterns of living for women to an astonishing extent and have in effect forced many women to find a new place for themselves in the world outside their homes.

But, aside from the inevitable emotional lag, it is quite true that women have always been primarily identified with the home and with the care and feeding of infants and that many of them still are. In applying these facts to the problems of jury service for women, therefore, their exemption from such service has been variously justified as (1) an effort to save women with small children at home from the hardships of jury service, (2) as expressed by Judge Hobson in his dissenting opinion in the case at bar (in which he expressed strong disapproval of the exemption), as an effort "to prevent women from being diverted from their primary duties as homemakers," or (3) as expressed in the majority opinion in the same case, as a means of preventing jury service from placing "an unwarranted strain upon the social and domestic structure," in view of woman's "role in society."

THE CLASSIFICATION OF WOMEN INTO A SEPARATE CATEGORY, FOR JURY SERVICE PURPOSES, IS UNREASONABLE

A Revolution has Taken Place in the Lives and Status of Women

It might be appropriate at this point to say a word about the emancipation of women, familiar as that revolution is to most of us, because it is the key to this case.

Blackstone's description of the status of married women under Common Law in England, whether wholly accurate or not,[21] is classic. He describes them as chattels, in

[21] See Mary R. Beard, *On Understanding Women*, p. 22, *et seq.*

effect slaves, their legal existence suspended during marriage, with limited freedom of movement, little right to property or earnings, no control over their children, and no political or civil rights of any kind. Blackstone's quip (slightly paraphrased) that "Husband and wife are one and that one is the husband" was no idle jest. At the very moment when a man met his bride at the altar and said to her, "With all my worldly goods I thee endow," he was actually taking every cent she possessed. Her children owed her no obedience, only "reverence". The head of the household really was. He could beat her with a stick "no bigger than the wedding ring." [22] All this on account of her "*defectum sexus.*"

Difficult as it is to believe, women still lingered under some of the most serious of the disabilities of that early *defectum sexus* when our Declaration of Independence and

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[22] *Black. Com.*, Gavit, pp. 189-190; 196.

See also Professor Trevelyan's *History of England*, pages marked "Women—position of." Reading these and marvelling at the contrast between the picture painted therein and the women of the period as portrayed in fiction, Virginia Wolfe was led to comment:

> "Indeed, if woman had no existence save in the fiction written by men, one would imagine her a person of the utmost importance; very various, heroic and mean; splendid and sordid; infinitely beautiful and hideous in the extreme; as great as a man, some think even greater. But this is woman in fiction. In fact, as Professor Trevelyan points out, she was locked up, beaten and flung about the room.
>
> "A very queer, composite being thus emerges. Imaginatively she is of the highest importance; practically she is completely insignificant. She pervades poetry from cover to cover; she is all but absent from history. She dominates the lives of kings and conquerors in fiction; in fact she was the slave of any boy whose parents forced a ring upon her finger. Some of the most inspired words, some of the most profound thoughts in literature fall from her lips; in real life she could hardly read, could scarcely spell and was the property of her husband." Virginia Wolfe, *A Room of One's Own*, pp. 74-75.

Constitution were penned. But the winds of change were blowing and Jefferson's heady prose, plus the three slogans of the French Revolution and the coming of the Industrial Revolution in the next century, which swept many of women's traditional occupations right out of their homes, and women along with them, all were to have their effect.[23]

By the first quarter of the last century the rights of both women and Negroes were being widely discussed. The catalyst for women, ironically enough, was an Anti-Slavery Convention held in London in 1840. Lucretia Mott and Elizabeth Cady Stanton attended, one as a delegate, the other as bride-wife of one. Women delegates to anything were unheard of in England at the time and the Convention almost fell apart in its indignation at the American women's effrontery. "It would be placing them on a footing of equality with us!," cried the passionate anti-slavery advocates—and promptly voted to throw the women out.

> "That night," writes Mrs. Stanton, "as Mrs. Mott and I walked away, arm in arm, we resolved to hold a convention as soon as we returned home, and form a society to advocate the rights of women." [24]

And so a Women's Rights Convention was held in Seneca Falls, New York, on July 16, 1848. It produced a

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[23] Ernest R. Groves, *The American Woman*, Chapters VIII, IX, X and XI, Woman's Political and Social Advance, Woman's Industrial and Educational Advance, The American Woman in the Twentieth Century, The American Woman and Her Changing Status.

[24] *Victory, How Women Won It*, National American Woman Suffrage Association, A Centennial Symposium, 1840-1940, pp. 16-21. It is a pleasure to record that William Lloyd Garrison of Boston, also a delegate but who arrived too late for this battle, was so indignant that he refused to offer his credentials or to take any part in the convention. He sat throughout the entire convention in the gallery with the women "looking down in grim and silent condemnation" on the scene.

document modelled after Jefferson's Declaration of Independence but with a difference. Entitled "Women's Declaration of Sentiments," it opened thus:

> "We hold these truths to be self evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; * * *.
>
> "The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world." [25]

Then came eighteen grievances, listed like Jefferson's, among them all the disabilities under which women had long been suffering, political, educational, economic, religious and social.

The woman's movement was launched. In magnificent prose (slightly borrowed), with little humor, but great intensity and dedication of purpose, the principles had been formulated and the issues joined. The best of American women's brains went into that bitter document. It is easy now to make fun of its quaintly exaggerated phrases. But none can gainsay the passion, the intensity of thought and feeling, that went into its making, the crusading zeal of those pioneering women ancestors of ours, their determination to destroy injustice and to restore elementary rights of human freedom, their consecration to their cause, their willingness to brave any and all indignities, to be mocked at, scorned and derided, all in pursuit of their great ideal of human liberty.

More than 100 years have passed. Most of those liberties are won. For one thing, and that perhaps most basic, women are educated. It is no longer true, as it was

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[25] *Victory, supra,* p. 27.

in Shakespeare's time, as Virginia Wolfe tell us,[26] that Shakespeare's sister could neither read nor write. We can. Women go to school, to college, even to graduate school, with the result that there is no bar, as there used to be, to their entry into practically all the professions. Partly on account of this, women's entry into economic life in all its phases and their opportunities there, both as wage-earner and as independent operator, have been greatly expanded. In our homes the relationship of husband and wife is increasingly that of a partnership of equals, with joint responsibility for the children. Women can hold property in their own right. They can pay taxes (there has never been any difficulty about that); but they can vote and legislate as well which assures that there is no taxation without representation. In fact women are now full-fledged emancipated citizens with most of the privileges and immunities and responsibilities appertaining thereto. Women are your peers, the peers of Supreme Court Justices, of Negroes, Mexicans, Jews, Catholics and even White Protestants. What disabilities remain are largely in the area of habit and custom, some of which can be helped by specific legislation (such as equal pay laws) but most of which can be cured only by education and the application of the great constitutional provisions of equality and fair play.

The Reasons Stated for Excluding Women from Jury Service are no longer Compelling or Valid

One of the remaining legal disabilities is this classification of women into a separate category for jury service, a category that seems to have outlived its time and purpose.

This consideration for the woman homemaker, that relatively small group of women of child-bearing age with small children to take care of at home, is admirable. But their numbers do not begin to include all women, the bulk

[26] Virginia Wolfe, *A Room of One's Own*, pp. 80-84.

of whom, who have no such special responsibilities, could be drawn upon just as men are now for this vital service. Furthermore, the hardship that jury service might subject them to could easily be prevented through the broad discretionary power of the judge to excuse in such cases. In fact it is unthinkable that a judge would not be eager to excuse mothers of children under such circumstances. To exempt all women in order to protect these few seems unrealistic and uncalled for.

In the U. S. today women comprise 33% of the total labor force, 36% of all women and girls over fourteen are members of the labor force, 55% of them are married and more than 30% of all married women work.[27] Fifty percent of all girls marry before they are 20. The average age of a woman when her last child enters school is 32.[28] Her normal life expectancy is 73.7 years (as compared with a life expectancy for men of 67.2).[28a] In other words only 11 years out of the average married woman's nearly 53 years of adult life (or 20%) are needed for or given over to baby-sitting. With a population steadily extending its life span, women already are more numerous than men by about three million and outliving them by six and one half years each, it is clear that our older citizens are becoming more numerous and more female all the time and the number of younger women with babies in the home less and less.

Judge Hobson, in his dissenting opinion in the case at bar, *supra*, put it well when he said:

> "No valid reason exists for limiting jury service to women who volunteer. Trial Judges have the same

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[27] U. S. Department of Labor, *Hand book on Women Workers*, for 1958, p. 2.

[28] *Women in the Sixties—Their Job World*, National Man Power Council, in conjunction with Bureau of Research, Studies and Program Resources, National Board of Young Women's Christian Association of the U. S. A., 1960.

[28a] For whites born in 1958; for non-whites, the expectancy is approximately seven years less in each category according to Public Health Service, as republished in the *World Almanac*, 1961, p. 464.

broad discretion to excuse women with pressing duties at home as to excuse men with pressing business commitments. Moreover, since the advent of woman suffrage and the entry, in this era of modernity, of untold numbers of American women into all fields of business and professional life, the reason given for excluding them from jury service no longer exists."

The Fact of their Exclusion works a Positive Injustice not only to them but to Persons other than Themselves

Not only are the reasons stated for the exemption of women no longer compelling or valid; there are other reasons for calling it unreasonable. Their exemption works a real hardship on the male juryman upon whom a greater burden of service is placed than would otherwise be the case. It deprives the conscientious woman citizen of the chance to feel that she too is performing her duty and makes it more difficult for her to do so. And lastly, it does great injustice to the female defendant (as in the case at bar) who so badly needs the diffused impartiality of a jury drawn from all segments of our society, emphatically including women.

There are thus really three rights affected by jury service. One is the right of men to have women share this onerous duty of citizenship with them. Another is the right of the fully emancipated, fully enfranchised woman citizen to exercise this important right and obligation of citizenship. It is a belittlement of her accomplishment in overcoming that long time sex defect of hers to suggest, even by implication, that even in this day and age she is perhaps still not qualified or capable of performing this simple act of good citizenship on the same terms as men. It is a genuine humiliation and degradation of her spirit. Not all women feel this way but some do and they constitute some of our most conscientious citizens. The third right is perhaps the most important. That is the right of

the woman accused of crime to have her case heard by a jury composed of the broadest possible cross section of the people making up her community, her neighbors and her peers, so that its impartiality may be insured by the wideness and diffusion of the interests it represents. In such a cross section can anyone doubt that women play an enormously important part?

For years men said that some cases were not "fit" for women to hear. They had in mind of course cases involving sex offenses. But nothing could have been more short-sighted or snobbish. For, as the *League of Women Voters* observed many years ago, "*such a trial concerns other persons more vitally than it does the jurors and one of these persons principally involved is always a woman or a girl. That fact in itself would seem to prove without further comment why there should be women on the jury no matter what may be the evidence that has to be produced to reach a verdict fair to the litigants and fair to the community.*" [29] (Emphasis supplied.)

In the case at bar the defendant is a woman and her crime is one of those dreadful marital tragedies which women have known about for centuries and in respect to which they certainly have every bit as great experience and capacity for understanding as men. Does it not shock our sense of fair play that, because a few young women with small babies at home might find it inconvenient to come to court to hear her case (and of course they would not have to because the Judge would excuse them), this woman should be deprived of even one single woman on her jury?

In *Ballard* v. *United States, supra*, Mr. Justice Douglas defined better than it has ever been defined before the special quality which women bring to jury service and which makes it so vital to have them serve. The case arose in the

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[29] *Women Jurors*, Julia Margaret Hicks, National League of Women Voters, pp. 15-16.

Federal District Court in California. A mother and son were the defendants. Compulsory woman jury service had recently been adopted in that State and the Federal court, required by law to follow the new State jury qualifications, had not yet done so. In his opinion, written in 1946, Justice Douglas went beyond the circumstances of the case to express the underlying philosophy upon which the whole concept of jury service for men and women rests. After remarking that "If women are excluded only half of the available population is drawn upon for jury service" he goes on to give the basic reason why they cannot be left out, at pp. 193-4:

> "It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men, personality, background, economic status and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? *The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables.*" (Emphasis supplied.)

Upon the strength of the *Ballard* case, the indictment of a woman for forgery was dismissed in 1947 in a New York case, *People* v. *Cosad*,[30] the court declaring that the absence of women on the Grand Jury was a violation of defendant's Constitutional rights. Women had been

[30] 189 Misc. 939, Seneca County, this being the County in which Seneca Falls, where the 1848 Women's Rights Convention was held, is located.

allowed by law to serve on New York juries, on a permissive basis, since 1938, but none had served on Grand Juries in Seneca County.

The Court said:

> "I find that persons of the female sex have been systematically excluded from service as grand jurors in Seneca County and particularly from the Grand Jury which indicted this defendant. Such systematic exclusion is a violation of this defendant's Constitutional rights." [31]

It is also interesting to note that in 1948 Arizona also found an optional woman jury law unconstitutional, *State* v. *Pelosi;* [32] and that in that State "women are now compelled to serve on juries if called, subject to statutory exemptions and excuses at the discretion of the presiding judge." [33]

Can anyone doubt that women defendants (and men too) need women as well as men on juries? Why wait until all the remaining twenty-two states and the District of Columbia have enacted laws conferring the obligation of jury service on women on the same terms as men? If we do we will be treating defendants in those states, who want to be judged by a true cross section of their peers, unequally and therefore unconstitutionally.

Congress appears to be of the same mind for it recently passed a law (in 1957) providing for women jury service in all Federal courts regardless of whether the State law of the district permitted it or not.[34] Apparently Congress

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[31] Quoting *Gerry* v. *Volger*, 252 App. Div. 217; *Peo.* v. *Shearer*, 169 Misc. 69; *Ballard* v. *U. S.*, 329 U. S. 187.

[32] Arizona Supreme Court, 99 Pac. (2nd) 125.

[33] *The Legal Status of Women in the U. S. A.*, U. S. Department of Labor, Revised 1956, p. 100.

[34] *1957 Civil Rights Act*, 28 U. S. C., Section 1861.

and the Federal courts are tired of waiting for backward states to act.

The Time to Act is now—the Florida Law should be Declared Unconstitutional and Jury Service Opened up to Women Everywhere on the same terms as Men

We cannot turn the clock back to 1878, much less to 1215. The "separate but equal" doctrine, disposed of in *Brown* v. *Board of Education, supra*, persisted far beyond its time, teaching and spreading injustice for Negroes all the way. Suddenly there came a fresh breeze across our national life and the evil clouds were swept away. It was the impact of World War II, the coming of the United Nations into our lives and our awakening to the world around us that brought this revolution in our thinking. Integration, we suddenly saw, was inevitable everywhere.

Just so with the advancement of women. The United Nations has brought a change into women's lives too. The words of the Charter, "Fundamental Freedoms for All without Distinction as to Race, Sex, Language, or Religion," are being translated into living deeds. The defect of sex is in process of being swept away on a world-wide scale at last. Only ten countries in the entire world now refuse voting rights to women, and in two of them the vote is refused to men as well.[35] Women are being brought out of their long-enforced segregation; the Moslem veil, the purdah of India, all are being abandoned; and women are beginning to mingle with men in the affairs of the world. The responsibilities of citizenship are being granted to them practically everywhere on the same terms as men. Should we in the United States be more backward than the rest of the world in integrating our women?

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[35] United Nations General Assembly *Report of Secretary General on Status of Women*; Constitutions, Electoral Laws, and other Legal Instruments Relating to Political Rights of Women, 1960.

I close with the words of Pearl Buck, long a close student of the world-wide movement of women towards human dignity and freedom:

> "Free men and free women, working on equal terms together in all the processes of life—and what is this but democracy? For in our preoccupation with nations and peoples and races, let us remember again that there is a division still more basic than these in human society. It is the division of humanity into men and women. Men and women against each other dstroy all other unity in life. But when they are for each other, when they work together, the fundamental harmony exists, the foundation upon which may be built all that they desire." [36]

CONCLUSION

For the foregoing reasons and for those advanced by the appellant, the provision of the Florida law requiring women to volunteer for jury service should be declared violative of the Constitution of the United States and Gwendolyn Hoyt's conviction of murder, therefore, should be reversed.

Respectfully submitted,

Dorothy Kenyon,
c/o American Civil Liberties Union,
156 Fifth Avenue,
New York 10, N. Y.

Phyllis J. Shampanier,
c/o Florida Civil Liberties Union,
509 Olympia Building,
Miami 32, Florida.
Attorneys for Amici.

Rowland Watts,
of Counsel.

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[36] Of Men and Women, p. 202.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 31

GWENDOLYN HOYT,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

BRIEF FOR APPELLANT

GOULSTON & STORRS
50 Federal Street
Boston, Mass.

HARDEE & OTT
308 Tampa Street
Tampa, Florida

Of Counsel:

HERBERT B. EHRMANN
50 Federal Street
Boston, Mass.

RAYA S. DREBEN
50 Federal Street
Boston, Mass.

Counsel of Record for Appellant

C. J. HARDEE, JR.
308 Tampa Street
Tampa, Florida

CARL C. DURRANCE
308 Tampa Street
Tampa, Florida

Counsel for Appellant

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BRIEF FOR APPELLANT

I.

Reference to the Reports of the Opinions Delivered in the Courts Below.

The opinions of the Supreme Court of Florida (R. 30-47) are reported in 119 So. 2nd 691.

II.

Jurisdiction of This Court

Jurisdiction of this Court rests on 28 U.S.C. §1257(2) and 28 U.S.C. §1257(3). Appellant was convicted of murder in the second degree and sentenced to thirty years hard labor. The statute here challenged, §40.01(1) Florida Statutes, is one of the provisions governing the selection of jurors who tried the Appellant. Also challenged is the action of the jury commissioners in selecting the jury.

The final judgment of conviction, order and sentence of the Criminal Court of Record of the County of Hillsborough and State of Florida was entered on January 20, 1958 (R.

29). The Supreme Court of Florida affirmed the conviction of Appellant in a majority decision on December 2, 1959 (R. 30), and denied Appellant's Motion for Rehearing in a majority decision on April 20, 1960 (R. 44). The Notice of Appeal was filed and served on April 20, 1960 (R. 48), and was timely under Rule 11 of the Rules of the Supreme Court of the United States.

III.

The Constitutional Provisions and Statutes Involved.

The Statute challenged as unconstitutional under the Fourteenth Amendment is Florida §40.01(1) (1 Fla. Statute 1959—167):

> "Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one years, who are citizens of this state, and who have resided in the state for one year and in their respective counties for six months, and who are duly qualified electors of their respective counties; provided, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit cour. her desire to be placed on the jury list."

Also challenged is the action of the jury commissioners in applying §40.01(1) and §40.10 (1 Fla. Statute 1959—169). Sec. 40.10 reads as follows:

> "The jury commissioners in counties described in 40.09 shall select and list 10,000 inhabitants of such county known or believed to be qualified under the law to be jurors, who, even if exempt, have not filed a written claim of exemption from jury duty as hereinafter provided. No juror's name shall be drawn twice for jury duty until the above list has been exhausted. In making

the selections and preparation of said lists, the jury commissioners may confer with the judge or one or more of the judges of the circuit court of such county, and shall have the power, without charge or cost, to examine, at any reasonable time all documents and records in the office of the clerk of the circuit court and of any other county officials as to persons who have been listed, summoned, not found, served or excused as jurors, and all books, records, and lists in the office of the supervisor of registration or other county official containing the names of electors of such county. The clerk of the circuit court shall furnish or cause to be furnished the necessary clerical aid to the commission."

Appellant's conviction was under Florida Statute §782.04 (2 Fla. Statute 1959—3077). Sec. 782.04 reads as follows:

"When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual it shall be murder in the second degree, and shall be punished by imprisonment in the State Prison for life, or for any number of years not less than twenty years."

The relevant portion of the Fourteenth Amendment is the first section thereof, which reads as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IV.

Questions Presented

1. Whether a female defendant may constitutionally be convicted of murdering her husband by a jury selected pursuant to a Statute which systematically excludes women from jury service by limiting jury service to those women who volunteer.

2. Whether jury commissioners may, without depriving a female defendant of her constitutional rights, discriminate against women in compiling the jury lists by arbitrarily and systematically limiting the number of women on such lists.

V.

Statement of the Case

Appellant was tried and convicted of second degree murder of her husband by a jury composed entirely of men, and drawn from a list from which, as hereinafter described, all women were virtually excluded.

The issues before the all-male jury involved the determination of a woman's state of mind. The information followed the statutory definition of second degree murder and charged her with "an act evincing a depraved mind regardless of human life." She pleaded not guilty and not guilty by reason of temporary insanity.

In the words of Judge Drew:

> "The homicide occurred at the parties' home when appellant, after prolonged marital discord and alleged infidelities, called her husband from his military station in another city by a false report of injury to their young son. She was unable to salvage their relationship by any means, when she was so informed by the deceased

> in a final and unequivocal fashion at the unfortunate moment when she was disposing of a damaged baseball bat, the fatal blows were struck. Immediate medical attendance could not repair the extensive head injuries which resulted in death the following day. Appellant gave a full account of events, which are not materially in dispute . . ." (R. 30).

The male jurors had to weigh the effect on Appellant of the extra-marital activities of her husband, and his callous flaunting of them (R. 37). They had to weigh the effect of Appellant's epilepsy which resulted in damage to that portion of her brain controlling the emotions (R. 37-38). As put by the majority opinion, they had to determine whether or not the "course of events affecting the marital relationship" produced "in defendant such a state of mind as to relieve her from criminal responsibility for her acts"[1] (R. 36).

The facts which led almost inevitably to a selection of an all-male jury to try these issues were brought out at the pre-trial hearing of December 5, 1957, held on Appellant's Amended Challenge to the Jury Panel (R. 8-25).

Appellant's Challenge (R. 4-7) rested on two grounds, namely that Sec. 40.01(1) was contrary to the Constitutions of the State of Florida and the United States; and that the names of women were "arbitrarily, systematically and intentionally excluded from the list."

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[1] In this connection the majority of the Florida court upheld the introduction of evidence showing that an unidentified man had hired a baby-sitter for Appellant, that the caller had given an assumed name for Appellant but her correct address; and that she had gone on a date with an unidentified man (R. 35-36). The minority opinion concluded that this evidence was inadmissible on any theory, and that it "was intended by the county solicitor to prejudice the jury against her" (R. 39).

The Statute challenged by Appellant provides "that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list." In 1957, the year Appellant was convicted, there were 114,247 registered voters in Hillsborough County, of whom 46,000 or forty percent were women (R. 23). Only two hundred eighteen or two hundred twenty women had registered their desire to serve as jurors (R. 16, 12), and of this number, only thirty to thirty-five had registered since 1952 (R. 12).

The jury commissioners in compiling the jury lists were required each year to make up a panel of 10,000 names (R. 9). In making up this list, the jury commissioners had to draw from the qualified male electorate, and from the women who had registered for jury service.

James Lockhart, one of the jury commissioners, and Katherine McPhillips, the clerk who actually compiled the list in 1957, testified as to the procedure in selecting the names of women. Mr. Lockhart stated that every year there is a new jury list, and that every year the names of ten or twelve women are placed on the list (R. 13). The average for the last four years prior to 1957 was ten or twelve women (R. 12).

Katherine McPhillips stated that she had been instructed to look at the lists of previous years to get the names of women[2] (R. 17). She stated that the reason she put on ten is that she went back two, three or four years and noticed how many women had been put on before, and that she had put on approximately the same number (R. 17).

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[2] It is not clear from her testimony whether she looked at the lists of previous years to determine the number of women to put on in 1956 or to determine the actual names and to use those same names time and again. Needless to say, the latter would be even more improper than the former.

In 1957 there were seven thousand names left from the 1956 list, and Miss McPhillips testified that only three thousand or twenty-five hundred names were added to the list in 1957 (R. 17-18). Throughout the year 1956, not a single female juror had been drawn (R. 46), for Miss McPhillips testified that there were still ten names left in the box from the 1956 list (R. 20). In compiling the 1957 list, she did not add the names of any women at all (R. 25), nor did she even refer to the list of women who were registered (R. 19). It may be appropriate to quote once more a small portion of Miss McPhillips' testimony in respect to this point (R. 19-20).

Redirect Examination by Mr. Durrance (Appellant's Attorney):

"Q. In other words, you did not use this book which you have at the present time which the clerk keeps downstairs for the registration of women who desire to serve on the jury? You did not use that book when you added these 2500 names on March 8, 1957?

A. No.

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Recross Examination by the State:

Q. A minute ago you testified that each year you put ten additional names in there because they had used ten before?

• • • • •

Q. What did you mean by that? I don't understand that.

A. What I mean is that we had ten women in the 7,000 names left that had not served. Had not served. So, we did not take their names out of the box, or out of the file that we use to compile the list and put them

in a 'Served' file. So, we still had ten ladies' names left in the box from the 1956 list."

Despite this evidence, and perhaps because of an arithmetical error, the trial court ruled adversely on Appellant's Challenge to the Jury (R. 24-25). The court pointed out that there were 68,000 eligible male jurors in the county, and that there were 275 eligible female jurors. He correctly pointed out that of the 10,000 in the box, there were approximately ten women in the box, and the rest, men. He went on to say, "On the eligibility list, that would represent about 27 per cent of the eligible women, and about 15 per cent of the eligible men, so I believe, percentage-wise, . . . that there certainly isn't any discrimination of the nature of which you complain. Percentage-wise there . . . were more women put in the box . . . than there were men."

The judge's computations are wrong. The correct computation shows that the panel included less than four per cent of the eligible women, not twenty-seven per cent.

At the conclusion of the trial, the all-male jury found the Appellant guilty of murder in the second degree (R. 28). Appellant was sentenced to thirty years hard labor (R. 29). The Supreme Court of Florida affirmed, two judges dissenting on non-Constitutional grounds. A Petition for Rehearing was denied, with two dissents, Judge Hobson dissenting on the Constitutional grounds.

VI.

Argument

A. Sec. 40.01(1) Florida Statutes, Deprives Appellant of the Equal Protection of the Laws.

1. *The Statute Has the Effect of Excluding Women From Jury Service.*

The undisputed facts brought out at the pre-trial hearing show conclusively that the effect of the Statute is to exclude all but a very small number of women from juries in Hillsborough County. Although forty-six thousand women were qualified electors in 1957 (R. 23), only two hundred twenty (R. 12), or at most two hundred seventy-five (R. 24), women volunteered for jury service. Thus, while women constituted forty percent of the total electorate (R. 23), and more than half of the population of the county,[3] volunteers for jury service constituted less than 6/10 of 1% of the women electors. Moreover, in the five years from 1952 to 1957, only thirty-five women registered in all (R. 12).

Other studies confirm these figures and show that when women have to volunteer in order to serve on juries, very few women volunteer.[4]

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[3] *1950 Census of Population*, Vol. 2, *Characteristics of the Population*, Pt. 10, Florida, Table 41, pp. 10-85, indicates that in 1950, the population of Hillsborough County was 122,976 males and 126,918 females.

[4] Hicks, Julia Margaret, *Women Jurors*, National League of Women Voters, p. 16 (1928).

2. *The Equal Protection Clause of the Fourteenth Amendment Prohibits Exclusion from Jury Service of Members of a Defendant's Class.*

This Court has consistently held that the exclusion of members of a defendant's class from jury service is a denial of equal protection of the laws. *Strauder* v. *West Virginia*, 100 U.S. 303, the landmark case, is particularly important to the case at bar, since it is relied upon by the Appellee to sustain the Statute's constitutionality.

Strauder involved a negro defendant convicted of murder by a jury constituted in accordance with a West Virginia Statute limiting jurors to white males. The conviction was reversed. The court pointed out that the words of the Fourteenth Amendment contain certain positive rights valuable to the colored race. Its members were entitled to be exempt from unfriendly legislation against them distinctively as a class, and to be free of legal discriminations implying inferiority in civil society and to enjoy the rights which others enjoy (pp. 307-308).

After stressing that prejudices often exist against particular classes which sway the minds of jurors and which, therefore, deny to persons of those classes the full enjoyment of protections which others enjoy, the court asked:

> "... how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal protection?" (p. 309).

The court emphasized that exclusion on the basis of race or color, and not exclusion for lack of qualification, was what was objectionable. This careful limitation was obviously necessary, for only eleven years before, "education

of negroes was almost non-existent and practically all of the race were illiterate".[5]

The court in the *Strauder* opinion then added:

> "We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing, make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages or to persons having educational qualifications" (p. 310).

It is this last statement which was relied upon by the majority opinion of the Florida Court (R. 32), and is now urged upon this Court by the Appellee (Appellee's Motion to Dismiss, pp. 3-4). However, this statement must be accepted merely for what it was,—namely, an illustration applicable to the American society of 1879.[6] It was not a

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[5] This description of negro education in 1868 was made by this Court in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, at p. 490.

[6] Until after the Civil War, public education for women in this country was practically non-existent. Extremely limited facilities were available to girls on all levels, elementary school, high school and college. For example, so many girls wanted admission to the only Boston High School open to them, that the school was closed eighteen months after its opening, because the city was unwilling to finance the institution. Bitter laments on the status of women's education are found in the annals of the Women's Rights Convention of 1851. See: Goodsell, Willystine, *The Education of Women*, pp. 22-23 (New York 1923); Davis, Paulina, *On the Education of Females*, Women's Rights Tracts No. 3 (1853); Taylor, Harriet C., *Enfranchisement of Women*, Women's Rights Tracts No. 4 (1853); and Reid, Mrs. Hugo, *Women, Their Education and Influence*, pp. 158 & 176 (New York, 1848).

The current picture is, of course, quite different. For example, in Florida in 1950, the median number of school years completed was *higher for females* than for males *at every age* between 7 and 75. *1950 Census of Population*, Vol. 2, *Characteristics of the Population*, Pt. 10, Florida, Table 64, pp. 10-163.

Constitutional mandate for all time. The reasoning of the *Strauder* court and the context of the statement, rather than the statement itself, is the precedent which concerns us. See *Reid* v. *Covert*, 354 U.S. 1, 50-51 (concurring opinion).

It is to be noted that the *Strauder* case did not limit discriminations in jury selections to race or color, the court saying, "Nor if a law should be passed excluding all naturalized Celtic Irish, would there be any doubt of its inconsistency with the spirit of the Amendment" (p. 308).

In an unbroken series of cases,[7] this Court has followed *Strauder* v. *West Virginia*, 100 U.S. 303. The decision in *Hernandez* v. *Texas*, 347 U.S. 475 clearly reaffirms the *Strauder* dictum *holding* that the equal protection clause extends beyond discrimination on grounds of race or color.[8] In finding that Texas improperly excluded Mexicans from jury service, this Court stated:

> "Throughout our history, differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time, other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community, is a question of fact. When the existence of a distinct class is demonstrated and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimina-

[7] Listed in *Eubanks* v. *Louisiana*, 356 U.S. 584 at Footnote 1.

[8] Cmp. this with *Fay* v. *New York*, 332 U.S. 261 at pp. 283-284.

> tion due to a 'two-class theory',—that is, based upon differences between 'white' and 'Negro'" (p. 478).

Had Appellant been a member of any class other than women, the exclusion of members of her class on that basis alone, would have been improper.

Moreover, this Court has never held that a woman is not denied equal protection of the laws when members of her sex have been excluded from the jury.

The only two opinions at all relevant are *Strauder* v. *West Virginia*, 100 U.S. 303 and *Fay* v. *New York*, 332 U.S. 261. But, neither of these cases involved a woman defendant. *Strauder* merely mentioned women in the context of qualifications for jurors. *Fay* v. *New York*, 332 U.S. 261 discussed the problem of exclusion of women more fully, and held that, in the absence of prejudice, it is necessary to rely on Congressional legislation to show a denial of equal protection. This is no longer the view of this Court. *Hernandez* v. *Texas*, 347 U.S. 475, has expanded the scope of the equal protection clause. Moreover, *Fay* v. *New York*, 332 U.S. 261, is clearly not binding, since here Appellant is a member of the class excluded. A further distinction may be found in the fact that the nature of Fay's offense (conspiracy to extort and extortion) was such that it could hardly be said that the absence of women from his jury might have been prejudicial or injurious.

Wherever this Court has dealt with exclusions of members of the same class as the defendant, this Court has held the exclusion improper. In *Ballard* v. *U. S.*, 329 U.S. 187, this Court held the exclusion of women improper where the defendant was a woman, the Court saying that the exclusion of women from jury panels "may at times be highly prejudicial to the defendants" (p. 195). The Court went

on to say that reversible error did not depend on the showing of prejudice in an individual case.

> "The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence, one on the other, is among the imponderables. To insulate the courtroom from either may not, in a given case, make an iota of difference. Yet a flavor, a distinct quality, is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded" (pp. 193-194).

See also *Glasser* v. *U. S.*, 315 U.S. 60, at p. 86.

In *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 the blanket exclusion of an economic or social class was held to deprive the jury system of the broad base required in a democratic society. The Court so held even though it did not appear whether defendant was a member of the class excluded.

Although the power of this Court is far broader in cases arising in the federal system, and therefore, these cases are not directly apposite, *Ballard* v. *U. S.*, 329 U.S. 187 recognizes the change in the role of women in our society, and the broader base for jury service required in the Twentieth Century.

This Court has often first applied certain standards to the federal courts, which later, because of changing moral and factual circumstances, have been applied to the states through the due process clause. A very recent example of this is *Mapp* v. *Ohio*, 6 L. Ed. 2nd. 1081 where this Court overruled *Wolf* v. *Colorado*, 338 U.S. 25, and required the

States to follow the federal rule.[9] *Culombe* v. *Connecticut*, 6 L. Ed. 2nd. 1037 and *McNeal* v. *Culver*, 5 L. Ed. 2nd. 445, especially concurring opinion at p. 451, are other recent examples where advancing standards of "what is deemed reasonable and right" for the states approaches the federal rule. This is not to say that the federal rule is one which is required of the states under the Fourteenth Amendment, but rather that this Court recognizes that as our standards of "what is deemed just" expand and develop, what formerly was merely sound judicial procedure becomes a "fundamental right." This is particularly true when new factual data is presented to the Court. As Justice Brandeis said:

> "It is a peculiar virtue of our system of law that the process of inclusion and exclusion, so often employed in developing a rule, is not allowed to end with its enunciation and that an expression in an opinion yields later to the impact of facts unforeseen". *Jaybird Mining Co.* v. *Weir*, 271 U.S. 609, 619 (dissenting).

Appellant submits that in view of the current status of women in American society, the rule expressed in *Ballard* v. *United States*, 329 U.S. 187, should now be adopted as a Constitutional mandate.

3. *Classification of the Florida Statute Denies Appellant the Equal Protection of the Laws.*

Florida recognizes that the educational advances made by women no longer justify exclusion of women on the ground that they are not qualified. The statute qualifies

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[9] The language of *Wolf* v. *Colorado* remains as appropriate as ever: ". . . basic rights do not become petrified as of any one time. . . . it is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights" (p. 27).

women equally with men. However, the Florida court in sustaining the Statute stated:

> "Whatever changes may have taken place in the political or economic status of women in our society, nothing has yet altered the fact of their primary responsibility, as a class, for the daily welfare of the family unit upon which our civilization depends. The statute, in effect, simply recognizes that the traditional exclusion was based not upon inherent disability or incapacity but upon the premise that such demands might place an unwarranted strain upon the social and domestic structure, or result in unwilling participation by those whose conflicting duties, while not amounting to actual hardship, might yet be expected, as a general rule, to affect the quality of their service as jurors" (R. 33).

There is no factual basis today for the assertion that jury service for women places "an unwarranted strain" upon society. Women with young children, and others having pressing domestic duties, would, it is granted, find difficulty in serving. However, a state may provide that these be exempt from jury service.[10] Such women are only a small proportion of the total female population. It is unreasonable to make the difficulties of the few[11] a pretense

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[10] As do, for example, Massachusetts and Georgia.

[11] It is interesting in this connection to read the speech of Wendell Phillips made at the Women's Rights Convention of 1851: "This is the argument: Stephen Girard cannot go to Congress, he is too busy; therefore, no *man* ever shall. Because General Scott has gone to Mexico, and cannot be President, therefore, no *man* shall be. Because A.B. is a sailor, gone on a whaling voyage, to be absent for 3 years, and cannot vote, therefore no male inhabitant ever shall. Logic, how profound! reasoning, how conclusive! Yet this is the exact reasoning in the case of woman. Take up the newspapers. See the sneers at this movement. 'Take care of the children,'—'Make the clothes,'—'See that they are mended,'—'See that the parlors are properly arranged.' Suppose we grant it all. Are there no women but housekeepers? no women but mothers?" Women's Rights Tracts, No. 2, p. 10 (1853).

for the exclusion from jury service of almost all the women of the State.

In 1959, women constituted one third of the labor force of this nation. Seventy-five percent of all single women twenty to sixty-four years of age, and more than thirty percent of all married women are working. Thirty-six percent of all women of working age are in the labor force.[12] Moreover, the proportion of women workers is growing. It is predicted that half of the additional workers in the labor force in 1970 will be women, resulting in a twenty-five percent increase for women workers, as compared with a fifteen percent increase for men.[13] Women with small children constitute a smaller proportion of the labor force, but as their children grow up, more and more women work.[14] Fifty-five percent of all women workers are wives.[15] After age thirty-five, differences in labor force participation rates between single women and married decrease.[16]

These figures are for the Nation, but similar figures apply to the State of Florida. For example, the 1950 Census shows that in Florida, thirty-one and 4/10 percent[17]

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[12] *1960 Handbook on Women Workers,* U.S. Department of Labor, Bulletin 275, p 2.

[13] *Ibid.,* p. 6.

[14] Thus among married women twenty to forty-four years of age, living with their husbands, the average proportion in the labor force varies from eighteen percent for those with children under six, to forty-two percent for those with school age children only, and to sixty-one percent for those with no children under the age of eighteen years. *Ibid.,* p. 41.

[15] *Ibid.,* p. 40.

[16] *Ibid.,* p. 36.

[17] *1950 Census of Population,* Vol. 2, *Characteristics of the Population,* Table 70, pp. 10-186.

of the female population worked. This figure compares with the figure for the Nation in 1950 of thirty-two percent.[18]

Appellant submits that it no longer makes sense to exclude women as a class from jury service. While a state may provide that an occupational group which is insignificant *numerically* may be excluded from jury service for the good of the community, *Rawlins* v. *Georgia*, 201 U.S. 638,[19] it cannot exclude more than half of its population.[20] "Tradition cannot justify failure to comply with the Constitutional mandate requiring equal protection of the laws." *Eubanks* v. *Louisiana*, 356 U.S. 584 at 588.

Most of the states of the Union have recognized this. Thus, at the present time, only three states exclude women from jury service (Alabama, Mississippi, and South Carolina), and three more states provide that only those women who volunteer shall serve on juries (Florida, Louisiana, and New Hampshire). Of the remaining forty-four states, about thirty states make jury service compulsory for women.[21] Women are eligible as jurors in the federal courts of all the states. 28 U.S.C. §1861.

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[18] *1960 Handbook on Women Workers*, U.S. Department of Labor, Bulletin 275, p. 30.

[19] Note that the Court in *Rawlins* pointed out that there was no prejudice to the defendant by the exclusion (p. 640).

[20] *1950 Census of Population*, Vol. 2, *Characteristics of the Population*, Table 25, pp. 10-40, shows that in 1950 the total population of the state was 2,771,305, of whom 1,404,388 were females.

[21] *1960 Handbook on Women Workers*, U.S. Department of Labor, Bulletin 275, p. 134, classifies the states in accordance with their laws for women jurors. However, compilation, at least, as to the State of Florida, is inaccurate.

Note that at the time of the *Fay* case, women were barred from jury service in thirteen states, *Fay* v. *New York*, 332 U.S. 261, p. 289, footnote 31, while today they are only barred from such service in three.

It is the facts of 1957, and not of 1866,[22] which govern the interpretation of the equal protection clause. This Court so held after extensive briefing on the intention of the framers of the Amendment.[23] *Brown* v. *Board of Education of Topeka*, 347 U.S. 483.

Segregation was judicially abolished "because the record of history, properly understood, left the way open to, in fact, invited, a decision based on the moral and material state of the Nation in 1954, not 1866." [24] This same record of history[25] now invites judicial abolition by this Court of exclusion of women from juries.

4. *Appellant Was Prejudiced by the Exclusion of Women.*

When *Ballard* v. *United States*, 329 U.S. 187, and *Fay* v. *New York*, 332 U.S. 261 were decided, the only facts available to this Court indicated that women when sitting as jurors did not tend to act as a class. *Ballard* v. *United States*, 329 U.S. 187.[26] However, recent studies made at the University of Chicago indicate that there is indeed a difference between the functioning of men and women as jurors. In the sociologists' jargon, women have been

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[22] In 1870 less than fifteen percent of all women sixteen years of age and over were breadwinners. *Women at Work, a Century of Industrial Progress*, U.S. Department of Labor, Women's Bureau (1933).

[23] See the article of Bickel, *The Original Understanding and the Segregation Decision*, 69 Harvard Law Review, 1-65 (1955), where the author examines most carefully the intentions of the framers and the Legislators ratifying the Amendment. See also questions posed by this Court in 345 U.S. 972.

[24] Bickel, *op. cit.*, p. 65.

[25] Bickel specifically points out that the same evidence applicable to segregation applies to jury service. *Op. cit.*, pp. 56, 64.

[26] At p. 193.

classified as showing more "social and emotional specialization", while men are more "task-oriented". Women tend to play the role of mediators, and to break tensions more than men. "Sex-typed differentiation" in the inter-action between men and women in jury deliberations "*can be reliably demonstrated.*" (Emphasis supplied.) Strodtbeck and Mann, *Sex Role Differentiation in Jury Deliberations*, 19 Sociometry 3 (March, 1956).

In addition to a difference in the role that women play on juries, what is even more important is that women as a group differ in their voting patterns. See figures reported in Strodtbeck & James, *An Attempted Replication of a Jury Experiment by Use of Radio and Newspapers*, 21 Public Opinion Quarterly, pp. 313-318 (Spring, 1957). Such voting patterns are particularly evident in cases involving the home and juveniles. See Rudolph, *Women on Juries —Voluntary or Compulsory*, 44 Journal of the Am. Jud. Soc., No. 11, p. 206 at 210 (April, 1961), where the author reports information obtained from an interview with Rita N. James, one of the authors of the article in the Public Opinion Quarterly.

The case at bar obviously involves the home and marital problems. The Appellant's claim is that she killed her unfaithful husband during a moment of severe emotional crisis. The question of whether her actions "evinced a depraved mind" is one where husbands and wives may differ. Indeed, it is impossible to conceive of a case where differences in voting patterns between men and women would show more strongly.

Appellant submits that she has shown prejudice, that "the procedure has gone so far afield that its results are a denial of equal protection and due process" even under

the strict views expressed in *Fay* v. *New York*, 332 U.S. 261.[27]

Where prejudice is shown to an individual as a result of state action, there must be a balancing by this Court of the interests of the state and the rights of the individual. Appellant submits that the interest of the community is not served by this statute. In any event, the prejudice to this Appellant as compared to the negligible interest of the community, especially in view of the far more reasonable alternatives available to the state, should lead this Court to hold the statute unconstitutional.

B. The Action of the Jury Commissioners in Arbitrarily and Systematically Limiting the Number of Women on the Jury Panel, Denied Appellant the Equal Protection of the Laws.

The undisputed evidence shows a consistent pattern limiting the number of women on the jury list to ten (R. 12-20). This number was determined without regard to the number of women registered for jury service. In fact, in 1957, the year Appellant was tried, the registration list was not even consulted, because not a single woman had been drawn out the entire year 1956. The set number of ten names remained from the preceding year's list.

The limitation was not authorized by the Florida statute. Nor was it an equal application of the laws to men and

[27] Both the equal protection and the due process clauses are here violated whether or not trial by jury is a "fundamental right" within the due process clause. (See *Reid* v. *Covert*, 354 U.S. 1 at p. 9.) Even if Florida can constitutionally abolish trial by jury, it cannot discriminate among similarly situated persons in granting the right of a trial by jury. Cf. *Griffin* v. *Illinois*, 351 U.S. 12. It cannot discriminate in the constitution of its juries, where such discrimination results in prejudice to the Appellant without denying Appellant due process of law.

women. Even if the Florida Statute were constitutional, nevertheless, the State may not discriminate in the application of the law. *Griffin* v. *Illinois,* 351 U.S. 12; see *Goesaert* v. *Cleary,* 335 U.S. 464 at 466.

No reason can be advanced for limiting the number of women in the jury box to ten each year, regardless of the number of women who volunteered for jury service. Any such limitation is unconstitutional. *Cassell* v. *Texas,* 339 U.S. 282; *Truax* v. *Raich,* 239 U.S. 33.

Appellant submits that the undisputed evidence shows a consistent pattern of exclusion within the principles of *Norris* v. *Alabama,* 294 U.S. 587.

Although the trial judge found that the percentage of women exceeded the percentage of eligible men (R. 24), this was the result of an arithmetical error. Apparently, the Supreme Court of Florida was unaware of this error, for it concluded that "the number so included was proportionately at least a fair representation of the total number of eligible women registered for jury service" (R. 31). These findings are not binding on this Court. Where federal rights are claimed, this Court will re-examine the facts to safeguard such rights. *Norris* v. *Alabama,* 294 U.S. 587.

Moreover, even if the proportion of eligible women had been equivalent to the proportion of eligible men so as to substantiate the mathematical findings of the Florida courts, any intentional limitation without rational basis, proportional or otherwise, is invalid. *Cassell* v. *Texas,* 339 U.S. 282; *Truax* v. *Raich,* 239 U.S. 33.

VII.

Conclusion

For the reasons submitted, the conviction of Appellant should be reversed.

Respectfully submitted,

HERBERT B. EHRMANN
RAYA S. DREBEN
C. J. HARDEE, JR.
CARL C. DURRANCE

IN THE

Supreme Court of The United States

NO. 31
OCTOBER TERM, 1961

GWENDOLYN HOYT,
Appellant,

-vs-

STATE OF FLORIDA,
Appellee.

BRIEF OF THE APPELLEE

RICHARD W. ERVIN
Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General

Counsel for the Appellee.

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BRIEF OF THE APPELLEE

STATEMENT OF THE CASE

Appellee accepts appellant's statement of the case only insofar as it reflects a true and correct resume of what the record below would reveal.

POINTS INVOLVED ON APPEAL

In essence but two points are posed for determination by this Court, to-wit:

WHETHER APPELLANT'S CONVICTION SHOULD BE SUSTAINED IN THE FACE OF SECTION 40.01, FLORIDA STATUTES, WHICH SECTION ACCEPTS WOMEN FOR JURY SERVICE ONLY IF THEY REGISTER THEIR WISH TO SO SERVE WITH THE CLERK OF THE CIRCUIT COURT?

This of course becomes a question of the constitutionality of Section 40.01, supra.

The remaining point is:

DOES THE RECORD UNEQUIVOCALLY REVEAL A SYSTEMATIC, PLANNED AND INTENDED EXCLUSION OF AVAILABLE WOMEN FOR JURY SERVICE DURING THE TERM OF COURT IN WHICH APPELLANT WAS TRIED?

ARGUMENT

POINT I

Appellant's protestations to the contrary notwithstanding, it does not appear that Section 40.01 (1), Florida Statutes:

"40.01 *Qualifications and disqualifications of jurors.*—

"(1) Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one years, who are citizens of this state, and who have

> **resided in the state for one year and in their respective counties for six months, and who are duly qualified electors of their respective counties; provided, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list.**

either directly or indirectly excludes any qualified woman elector from serving as a juror if that be her wish. Even adopting appellant's numerical pronouncement, there is no reason, with or without the confines of the section above quoted, to suspect, urge or argue that 46,000 women could not have become potential jurors in Hillsborough County, Florida, in 1957.

Though the record is somewhat vague as to the number who actually registered their wish to serve as jurors, (R. 12, 24) let us assume that the acceptable figure of 250 reflects the number of women who had been so registered at the time of appellant's trial. Does it, by any stretch of the imagination, follow that because only that number registered, the statute excluded women from service as jurors? Of course, the answer to this must be an unqualified "no".

It is of no particular consequence that certain writers may have concluded that very few women volunteer to serve on juries when that is a prerequisite.

It must be remembered that the constitutional condemnation (due process) is limited to the exclusion of a class without regard or reason.

Appellee concedes the decisions of this Court condemning unconstitutional discrimination against classes, see *Hernandez v. Texas*, 74 S. Ct. 667, 98 L. Ed. 866, 347 U.S. 475; *Brown v. The Board of Education of Topeka*, 347 U.S. 483, 492, and *Thiel v. Southern Pacific Company*, 166 A. L. R. 1412, 90 L. Ed. 1181, 66 S. Ct. 984, 328 U.S. 217; and will cheerfully concede the salutary effect they have had on subsequent proceedings involving substantially the same circumstances. However, appellee is quick to note that no such blanket exclusion can be found within the confines of this case or the legislation under attack.

Only recently this Court in the case of *Fay v. New York*, 332 U.S. 261, 91 L. Ed. 2043, put an almost identical question finally and fully to rest in the majority opinion rendered in that case. It would serve no useful purpose for this Court to again recite circumstances not unlike those which it found acceptable in the *Fay* case, supra, here simply to reannounce an already well-established principle.

This Court's attention is called particularly to the phase of the argument presented by appellant wherein she concedes that it has been held that any state legislature may exclude an entire class of citizens such as females from jury service (see *Strauder v. W. Va.*, 100 U.S. 303, 25 L. Ed. 664; *United States v. Roemig*, 52 Fed. Supp. 852; and *Hall v. State*, 136 Fla. 644, 187 So. 392; See Annotation; 157 A. L. R. 464.)

However, in an attempt to detract from the support these cases lend that general proposition, she alludes to

several recent decisions of this Court, wherein, because of rulings on the specific point of excluding Negroes and/or Mexicans *solely because of race*, she concludes there may be some doubt of the continuing validity of those former rulings.

Such a complaint certainly cannot be aimed at the Fourteenth Amendment to the Federal Constitution inasmuch as the amendment itself does not either directly or in effect prohibit the states from denying women the right to serve on juries—nor does it render void a statute providing for the selection of males alone as jurors. See *Strauder v. W. Va.*, supra. Her alleged condemnation must find its fertile ground if anywhere, within either the "equal protection" or "due process" clauses thereof. That simply cannot be done because of the *Fay* case, supra.

Appellant's right in this case, or for that matter, in any case, is merely one to a neutral jury. See *Fay v. New York*, supra. It is noted she never assailed the jury which did convict her because of bias, non-neutrality, or prejudice. Certainly she had no constitutional right to female friends on the jury.

Appellant makes several grand references to landmark cases where the *systematic, planned and intended exclusion of certain classes of citizens from jury duty* (because of race, creed, color or economic status), has been repeatedy struck down by this Court. We have no quarrel whatever with those cases *in the sphere of their operation*. However, we are unable to discover how she seeks to expand the principle announced in those cases to cover her present situation.

For whatever this Court may consider it to be worth, the case most nearly factually identical to the one at bar is *State v. Dreher*, 166 La. 924, 118 So. 85, Cert. Denied 278 U.S. 641, 73 L. Ed. 556, 449 S. Ct. 36. To be sure, your appellee does not urge that a denial of certiorari by this Court constitutes a favorable ruling on the merits, however, it is deemed appropriate to present it for purposes of persuasive illustration.

Among the points urged for reversal in the *Dreher* case, supra, was a claim that the constitutional and statutory provisions that no woman should be drawn for jury service unless she had filed a written declaration of her desire to so do was invalid and, furthermore, that this woman, one of the women defendants in the case, had a right to be tried by a mixed jury of men and women. It is interesting to note that the provision relating to women jurors in the State of Louisiana reads almost exactly like the one in Florida provided for in Section 40.01 (1), supra. The two appropriate sections read as follows:

Florida Statute:

"provided, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list."

Louisiana Statute:

"That no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the district court a written declaration of her desire to be subject to such service."

It appears from the above that no particular depth is necessary in order to see that the two provisions are so nearly identical as to literally mirror each other.

Appellee does not consider it remiss to suggest, or perhaps even urge that despite the mystic shroud which engulfs a denial of certiorari, such a denial must mean something more than a mere declination to review. The appellee cannot bring itself to believe that such a cataclysmic series of events (the denial of the right to women to serve as jurors in Louisiana courts), calculated to deprive *a woman defendant* of her rights to "equal protection" under the Fourteenth Amendment to the United States Constitution, would produce in this Court no greater wish than to enter a simple order denying certiorari UNLESS this Court genuinely believed that even if everything was as urged, no rights had been violated thereby.

Having preceded such denial by its yet unchanged ruling in *Strauder v. W. Va.*, supra, and following such denial by its yet unchanged and infinitely more pointed ruling in *Fay v. New York*, supra, one can only wonder what, if indeed any, new basis has been presented in the instant case to merit the complete turnabout so devoutly wished by appellant.

The supreme court of Louisiana stated in the *Dreher* case, supra, at pages 92 and 93, that they had formerly ruled on the point in another cited case and said that they had considered the argument that such a provision was discriminating as to women jurors, and concluded that as a matter of fact, it was altogether favorable to

them because it gave them the option of saying whether they would be subject to that jury service or not. The court concluded, saying at page 93:

> "This section is reasonably permissive, as the exercise of the right to serve as jurors is not burdened with any arbitrary restriction imposed upon women because of sex or as a class, but has been incorporated into the organic law of the state solely for the purpose of avoiding compulsory service of women upon juries, contrary to their wishes to exercise such a privilege of citizenship."

Thus, it is also true here that if there is indeed such an exclusion as that sought to be urged by appellant in the instant case, it is an exclusion put into effect solely and exclusively by virtue of the very people effected. In short, the potential women jurors of Hillsborough County have the unqualified option of declaring themselves available or unavailable for jury service by registering their intent with the clerk of the circuit court as provided in the aforementioned section.

Thus it is, we see, that the touchstone is "availability" and not "eligibility" to which the legislation directs itself. All the qualified female electors in Hillsborough County, Florida, are eligible to serve as jurors. Whether they make themselves "available" is a matter left entirely to them and them alone.

The conclusion has been advanced that inasmuch as a court is, or should be, free to relieve women jurors of this civic duty because of pressing demands that only they can serve, there is no need to make their service as jurors a voluntary act.

Certain it is that the women in question are best qualified to determine if and when they are free to serve as jurors and it matters not that they indicate a negative wish by simply refusing to register rather than being forced to go to the courtroom and make an affirmative request of the judge that they be relieved of the responsibility. So it is again that the question becomes one of "availability" and not "eligibility".

Appellant then makes much of the strides which women have made since their enfranchisement. She cites an impressive array of statistics to indicate the role which women play in our modern-day world in an effort to buttress her conclusion that what may have existed as a condition in 1879 such as might have prompted this Court to conclude in its opinion in the case of *Strauder v. W. Va.*, supra, that women can be completely excluded from service as jurors by the several states, is no longer necessarily so and therefore such a pronouncement should not only be refused but overruled.

Until recently and perhaps for very nearly half a century after the adoption of the Fourteenth Amendment, it seemed to be universal practice in this country to allow only men to sit on juries. It seems that the first state to permit women jurors was Washington and even it did not do so until 1911. See: *1911 Laws of Washington*, c. 57. See: *Carson, Women Jurors* (1928). Even so recently as 1942, only 28 states permitted women to serve on juries—they were still disqualified in the other 20. Moreover, of these 28 states which permitted women

to serve as jurors, in 15 of them the women were privileged to claim an exemption because of their sex. See: *Report to the Judicial Conference of the Committee on Selection of Jurors* (1942), 23. Consequently, we align our rationale with that of this Court in the *Fay* case, supra, in that it would, in light of such a history, take something more than a judicial interpretation to spell out of the Constitution a command to set aside verdicts rendered by juries which were unleavened by feminine influence.

Appellant's contention essentially is that women should be freely admitted on juries and is one which cannot be said to be based on the Constitution, but, rather, one which is based on a changing view of the relative rights and responsibilities of women in our public and social life. While it may be true that this has actually progressed in virtually all phases of life as we know it today, including jury duty, it certainly has not achieved the stature of a constitutional compulsion on the states, excepting only as reflected in the grant of women's enfranchisement by the 19th Amendment to the United States Constitution.

Quite apart from the historical differences which have long formed the basis upon which a given legislature may hold that women are ineligible to serve as jurors (See *Strauder v. W. Va.*, supra); which historical difference has not been modified in any substantial particulars, it must be apparent that there does not exist, within the confines of this statute, any reference or mention to "exclusion" of women as jurors in the State of Florida. It is, quite the contrary, a permissive right given them, said

right implemented by the simple expedient of announcing their wish to serve as potential jurors to the clerk of the circuit court.

Appellee notes that nowhere within the confines of appellant's brief is any statistic cited which would, even in the slightest, tend to do away with the very practical and material reasons for the differences in responsibilities assigned to men and women in our society.

Ever since the dawn of time conception has been the same. Though many eons may have passed, the gestation period in the human female has likewise remained unchanged. Save and except for a number of beneficial precautions presently available, parturition is as it well may have been in the Garden of Eden. The rearing of children, even if it be conceded that the socio-psychologists have made inroads thereon, nevertheless remains a prime responsibility of the matriarch. The home, though it no longer be the log cabin in the wilderness, must nevertheless be maintained. The advent of "T.V." dinners does not remove the burden of providing palatable food for the members of the family, the husband is still, in the main, the breadwinner, child's hurts are almost without exception, bound and t r e a t e d by the mother.

No part of appellant's statistical attack, or for that matter, her textual assault, even so much as attempts to broach the above. Her negative choice in this respect (surely there was a choice) was well advised, for these are the classic differences and bases upon which the sound pronouncement of this Court in *Strauder v. W. Va.*,

supra, was founded—they are every bit as sound and compelling today. The only bulwark between chaos and an organized and well-run family unit is our woman of the day. She and she alone ministers to our wants and needs as the partner in marriage, the mother in travail, and the healer and comforter during illness and sadness.

Should our woman of the day find herself possessed of sufficient free time and inclination, she has but to voice her wish to be a juror with the clerk of the circuit court and no one would gain-say her right to so serve.

Nor is it correct to say that this Court rejected the cases discussed in the *Fay* case, supra, in its decision in *Hernandez v. Texas*, supra.

It is apparent that what appellant really contends is, that she had a right to be tried by a jury on which there were females. This is clearly obvious from her argument throughout the pleadings both in the Florida Supreme Court and here. Whatever may be the merit in such a claim, your appellee respectfully suggests, nay urges, that appellant's right is not one of selecting her jurors but, rather, in rejecting those on the panel. She had no more right to be tried by a mixed jury of women and men than would a male defendant. Essentially, it can be said that the Constitution of the United States merely guarantees that in all criminal prosecutions, the accused shall have the right to a speedy and public trial by an "impartial jury". Her true contention thus becomes a claim that the absence of women on the jury panel deprived her of the right to trial by an "impartial jury" contrary to the precepts of the Constitution.

An "impartial jury" is not denied by the absence or exclusion of women from jury duty. "Impartiality" has nothing to do with whether women are subject to jury duty or not. "Impartiality" is *a state of mind*. Its existence or absence does not depend upon whether the juror is male, female, black, white, or what have you.

That same contention was raised and quickly dispelled in the case of *Baker v. Hudspeth* (CCA 10th 1942), 129 Fed. 2d 779, See Text 781, 782, certiorari denied 617 U.S. 681, 87 L. Ed. 546; rehearing denied, 317 U.S. 711, 87 L. Ed. 566, 318 U.S. 800, 87 L. Ed. 754.

The test of "impartiality" there laid down should be of equal applicability here.

Thus, it must follow as the night the day that appellant, in the prosecution below, was heard by a jury (which she accepted), impaneled pursuant to a lawful provision of Florida law, enjoyed every right consistent with sound, legal principles and had none of her rights, privileges, or immunities abridged by any act of Florida or by the jury commission.

POINT II

The suggested arbitrary selection made by the jury commission occurs every day—in one degree or another —throughout our land. Each time a jury box is filled or list compiled, the names selected must be the product of an arbitrary selection: that simply must occur at one stage or another of the proceedings. However, conceding this; and surely one must, one complaining must show

the arbitrary selection was a deliberate, planned, systematic exclusion not possessed on any legality whatsoever.

This very Court, in its opinion in the *Fay* case, supra, had this to say anent the point:

> "It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination, and in nearly all cases it has been shown to have persisted over many years. Virginia v. Rives 100 U.S. 313, 322, 323, 25 L. ed. 667, 670, 671; Martin v. Texas, 200 U.S. 316, 320, 321, 50 L. ed. 497, 498, 499, 26 S. Ct. 338; Thomas v. Texas, 212 U.S. 278, 282, 53 L. ed. 512, 513, 29 S. Ct. 393; Smith v. Texas, 311 U.S. 128, 85 L. ed. 84, 61 S. Ct. 164; Hill v. Texas, 316 U.S. 400, 86 L. ed. 1559, 62 S. Ct. 1159; Akins v. Texas, 325 U.S. 398, 89 L. ed. 1692, 65 S. Ct. 1276, supra. Also, when discrimination of an unconstitutional kind is alleged, the burden of proving it purposeful and intentional is on the defendant. Tarrance v. Florida, 188 U.S. 519, 47 L. ed. 572, 23 S. Ct. 402; Martin v. Texas, 200 U.S. 316, 50 L. ed. 497, 26 S. Ct. 338; Norris v. Alabama, 294 U.S. 587, 79 L. ed. 1074, 55 S. Ct. 579; Snowden v. Hughes, 321 U.S. 1, 8, 9, 88 L. ed. 497, 502, 503, 64 S. Ct. 397; Akins v. Texas, 325 U.S. 398, 400, 89 L. ed. 1692, 1694, 65 S. Ct. 1276."

The appellant's stand under this question is one of at least questionable import, inasmuch as this Court never has rejected the principle it announced in the case of *Strauder v. W. Va.*, supra, wherein it said there was no restriction imposed by the Fourteenth Amend-

ment against a state denying women the right to serve on a jury. It is perforce idle to suggest for one moment that the instant case presents an area of such magnitude simply because in this instance a woman defendant was tried by a jury (not itself alleged to be either prejudiced, biased, or partial), which was unleavened by the presence of women.

In the first place, this Court said in the *Fay* case, supra, that no defendant has a right to friends on the jury nor do they have a right to either all male, all female, or any particular proportion thereof. Inasmuch as that specific ruling (sans dissent) has been made by this Court, it is of little if indeed any significance that this Court has not specifically said that a *woman* defendant convicted in a State court by a jury unleavened by women, did not receive equal protection.

Whatever else may be true, neither this Court nor, for that matter, any other court, has yet required the presence of women on juries as a necessary adjunct to full compliance with the well-ordered precepts of due process and equal protection as we know it today.

Even conceding that the jury commission in question did not add any new names of available women jurors when they replenished the depleted jury box, it cannot be said that this constituted the type of action so frequently condemned as an arbitrary, planned and intended discrimination against a class. The ten women's names that went into the jury box initially formed an appreciable representation of those who declared themselves

available; just as did the 9000 odd men's names form an appreciable representation of the approximately 70,000 available men jurors.

It further follows that even if the jury commission had placed all but one woman's name in the box, appellant's position would logically be the same yet who would argue that all the men's names had to be placed in the box?

The jury commission in question must make such selections as they deem intelligent in the circumstances.

Since no women had been called from the initial jury box and since the figure first introduced into the box was at least representative of the women jurors available, there was no need to add thereto. If this be condemned, then indeed why not condemn the failure of the jury commission to include the entire list of male jurors—on the theory that the failure to do so made the jury box non-representative.

Throughout the course of appellant's brief the single thread which forms the knot is as follows:

Because she was a woman and had committed an act, the circumstances of which could best be understood by women, she was deprived due process because she had no real chance of securing a woman on her jury. This position is one which she cannot support by any law or rationale with which appellee is acquainted. See *Fay v. New York*, supra.

Might it not be further argued logically that since women have been shown, by appellant's own statistics,

to be the equal of men in every sense of the word, that she was in fact tried by the ultimate in juries—male equivalence appearing to be the goal of the statistical position advanced by the appellant?

CONCLUSION

WHEREFORE, appellee respectfully urges this Court, upon the authorities set out above and arguments advanced thereunder, to affirm the conviction at issue.

Respectfully submitted,

RICHARD W. ERVIN
Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General

Counsel for the Appellee.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Brief of the Appellee to the Honorable Herbert B. Ehrmann, 50 Federal Street, Boston, Massachusetts, Counsel for the Appellant, by mail, this ..... day of September, 1961.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel for the Appellee.